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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

LESTER C. NEWTON TRUCKING COMPANY, ET. AL.,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and ASSOCIATION OF AMERICAN RAILROADS, ET. AL.,
Appellees.

On Appeal from the United States District Court for the District of Delaware

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JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the District of Delaware, entered on October 15, 1962, dismissing a complaint seeking to set aside orders of the Interstate Commerce Commission, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the District Court for the District of Delaware is reported in 209 F. Supp. 600, and a copy is attached hereto as Appendix A. The opinion of the Inter-

state Commerce Commission is reported in 81 M.C.C. 649, and a copy is attached hereto as Appendix B.

JURISDICTION

This suit was brought under 28 U.S.C. § 1336, to set aside orders of the Interstate Commerce Commission. The judgment of the District Court was entered on October 15, 1962, and notice of appeal was filed in that Court on November 21, 1962. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101 (b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express*, 351 U.S. 49; *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515; *Frozen Food Express* v. *United States*, 351 U.S. 40.

QUESTION PRESENTED

Do Section 203(b) of the Interstate Commerce Act and Section 7 of the Transportation Act of 1958 authorize motor carriers to continue to transport frozen vegetables irrespective of whether their processing involves cooking longer than necessary to inactivate enzymes.

STATUTES INVOLVED

Section 203(b)(6) of the Interstate Commerce Act [49 U.S.C. § 303(b)(6)] and Section 7 of the Transportation Act of 1958 [Public Law 85-625, 85th Cong., 2nd Sess. are set forth in Appendix C hereto.

STATEMENT

Section 7 of the Transportation Act of 1958 amended the exemption from economic regulation for the motor

vehicle transportation of agricultural commodities, provided in Section 203(b)(6) of the Interstate Commerce Act. The amendment fixed the status of many commodities and created continuing transportation ("grandfather") rights respecting those whose transportation was thereby made subject to regulation. Frozen vegetables were among those specifically declared in the 1958 Act to be nonexempt. Accordingly, motor transportation of all frozen vegetables is now subject to full economic regulation by the Interstate Commerce Commission.

Appellants are common carriers by motor vehicle of property, including frozen vegetables, and packers of foodstuffs, including frozen vegetables, who ship and receive these commodities in interstate commerce.[1] Appellant motor carriers all transport frozen vegetables by virtue of "grandfather" rights provided in Section 7(c) of the 1958 Act.[2] They have, since prior to the 1958 Act, transported all types of frozen vegetables. Solely at issue here is their right to continue to transport certain specific frozen vegetables termed for convenience "cooked frozen vege-

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[1] The following Appellants are motor carriers: Lester C. Newton Trucking Company, Watkins Motor Lines, Inc., Colonial Refrigerated Transportation, Inc., Clay Hyder Trucking Lines, Inc., Warren P. Kurtz, d/b/a Lake Refrigerated Service, Langdon Truck Lines, Inc., Peter Hollebrand, Lipsman-Fulkerson & Company, Ralph F. Dunkley, d/b/a Dunkley Distributing Company, J. Edward Jarman, and Hale Distributing Co., Inc.

The following Appellants are packers of foodstuffs: Seabrook Farms Co., Division, H. Leggett & Company, Mrs. Paul's Kitchens, Division of E. J. McAleer & Co., Inc., Dulany Foods, Inc., Southland Frozen Foods, Inc., Ark-Homa Farms Frozen Foods, Inc., The Snake River Trout Company, Vahlsing, Inc., and Potato Service, Inc.

One Appellant, The Winter Garden Freezer Co., Inc., is both a motor carrier and a packer of foodstuffs.

[2] Some have now received certificates of public convenience and necessity issued thereunder covering, *inter alia*, "frozen vegetables"; the remainder operate under interim rights pending final disposition of their applications.

tables".[1] The Commission found these vegetables *nunc pro tunc* not to be exempt unmanufactured agricultural commodities prior to the 1958 Act; they were held by the District Court not within the "frozen vegetables" for which the 1958 Act conferred "grandfather" rights.

(1) *Background*

Prior to the 1958 Act, Section 203(b)(6) of the Interstate Commerce Act, as amended, exempted from the Commission's economic regulation:

> Motor vehicles used in carrying property consisting of . . . agricultural (including horticultural) commodities (not including manufactured products thereof) . . .

The scope of this exemption was much litigated, the Commission viewing it narrowly, courts repeatedly rejecting the Commission's construction in favor of a liberal construction.[2] This Court, in the *East Texas* case,[3] examined the statutory history and found that substitution of the term "manufactured products" for the word "unprocessed" prior to adoption was designed to broaden the scope of the

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[1] The specific frozen vegetables involved and covered here by the term "cooked frozen vegetables" are: frozen french fried potatoes, frozen rissole potatoes, frozen potato puffs, frozen whipped potatoes, frozen candied sweet potatoes, frozen winter squash, frozen french fried onion rings, frozen "pouch-packed" vegetables.

[2] E.g., *Interstate Commerce Commission* v. *Allen E. Koblin*, 113 F. Supp. 599 (N.D., Iowa), aff'd 212 F. 2d 555 (C.A. 8), *cert. den.* 348 U.S. 836; *Frozen Food Express* v. *United States*, 128 F. Supp. 374 (S.D., Tex., Houston Div'n), rev'd in part 351 U.S. 40, aff'd in part *sub nom. East Texas Motor Freight Lines, Inc.*, v. *Frozen Food Express*, 351 U.S. 49, further consideration 148 F. Supp. 399 (D.C., S.D., Tex., Houston Div'n), aff'd *per curiam* 355 U.S. 6; *Home Transfer & Storage Company* v. *United States*, 141 F. Supp. 599 (W.D., Wash.), aff'd *per curiam* 352 U.S. 884.

[3] *East Texas Motor Freight Lines, Inc.*, v. *Frozen Food Express*, 351 U.S. 49.

exemption "by making clear that the exemption was lost not by incidental or preliminary processing but by manufacturing."[6] The proper criterion for determining the status was explained:

> At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been "manufactured" within the meaning of § 203(b)(6).[7]

Applying the "continuing substantial identity" test, two District Courts, in 1956 in the *Home Transfer* and *Frozen Food* cases reversed the Commission and held all frozen fruits and vegetables before them to be exempt unmanufactured agricultural commodities.[8]

Thereafter, several proposals were made in Congress to eliminate or amend the agricultural commodities exemption. While these were pending the Commission's Bureau of Motor Carriers, on March 19, 1958, issued an informal opinion termed "Administrative Ruling No. 107". This Ruling contained a Commodity List together with the Bureau's opinion as to the status of numerous commodities, including various vegetables. In adopting Section 7 of the Transportation Act of 1958 Congress provided in Section 7(a) for the amendment of Section 203(b)(6) by the addition of two provisos: the first, in effect, incorporated the Commodity List of Administrative Ruling No. 107; and the second, ("notwithstanding the preced-

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[6] *Ibid.*, at 52.

[7] *Ibid.*, at 54.

[8] The Commission had found all frozen vegetables to be non-exempt manufactured products. *Determination of Exempted Commodities*, 52 M.C.C. 511, at 534, 557. Included among the frozen vegetables found to be agricultural commodities in the *Home Transfer* case were frozen garden peas, cauliflower, asparagus, spinach, broccoli, corn, green beans, brussel sprouts, butter beans, rhubarb and carrots. Among the commodities found within Section 203(b)(6) in the *Frozen Food* case were vegetables (quick-frozen).

ing proviso" specifically declared 11 commodities (including "frozen vegetables") not within the exemption. Section 7(c) of the 1958 Act created "grandfather" rights for those commodities whose transportation was "made subject" to regulation by Section 7(a).

(2). *History Of This Proceeding*

Following enactment of the 1958 Act the Commission indicated informally that it considered the "grandfather" rights conferred by Section 7(c) to extend only to those frozen vegetables specifically held exempt in the *Home Transfer* case. Since frozen french fried potatoes and other so-called "cooked frozen vegetables" handled as exempt prior to the 1958 Act were not considered in the *Home Transfer* case, numerous packers and carriers (including eleven of the Appellants) petitioned the Commission for a Declaratory Order under Section 5(d) of the Administrative Procedure Act [5 U.S.C. § 1004(d)] respecting the status of these vegetables.

The Commission designated the proceedings No. MC-C-2522, "*Frozen Cooked Vegetables—Status*", and assigned the Petition for hearing, held before a qualified Hearing Examiner in Washington, D. C., April 27 and 28, 1959. Evidence was introduced concerning the processing and marketing of various types of vegetables and other foodstuffs. In opposition were various rail and motor carriers and associations.[9]

[9] Included among those in opposition were the carriers and associations who intervened as defendants before the District Court: Association of American Railroads; Regular Common Carrier Conference of the American Trucking Association, Inc.; Class I Railroads in Southern Territory; Class I Rail Carriers in Western District; Bangor & Aroostook Railroad Company; Maine Central Railroad Company; Boston & Maine Railroad; New York, New Haven & Hartford Railroad Company; New York Central Railroad Company; Baltimore & Ohio Railroad Company; Pennsylvania Railroad Company; Lehigh Valley Railroad Company; Chesapeake and Ohio Railway Company; and Erie-Lackawanna Railroad Company.

Briefs were filed by the parties on June 5, 1959. Omitting an examiner's recommended report without explanation, the Commission, Division 1, issued a Report and Order dated September 28, 1959, served October 6, 1959, denying the request for a Declaratory Order under Section 5(d) of the Administrative Procedure Act, the Commission issued "an interpretative opinion", concluding and finding: [10]

> We conclude and so find that the term "agricultural (including horticultural) commodities (not including the products thereof)" as used in section 203(b)(6) of the Interstate Commerce Act prior to the amendment thereof by the Transportation Act of 1958, did not include frozen french fried potatoes, frozen rissole potatoes, frozen potato puffs, frozen candied sweet potatoes, frozen whipped potatoes; frozen french fried onion rings, frozen precooked pouch-packed vegetables in general, and frozen precooked pouch-packed vegetables with sauce in particular. We further conclude and find that such term did not include any frozen vegetable which has been cooked in water or steam for a period longer than that necessary for the inactivation of the enzymes; any frozen vegetable which has been cooked by immersion in oil or fat; or any vegetable product the ingredients of which include vegetable matter combined with other commodities.

Following its practice in other similar proceedings, the Commission's Order "discontinued" the proceedings.[11] A timely Petition for Reconsideration was filed, to which opposing parties replied. By Order dated August 3, 1961, served August 29, 1961, the Entire Commission denied the Petition.[12]

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[10] *Frozen Cooked Vegetables—Status*, 81 M.C.C. 649, at 656.

[11] Compare *Frozen Food Express v. United States*, 351 U.S. 40.

[12] Following the Commission's Report and Order dated September 28, 1959 various rail and motor carrier associations and companies filed Petitions seeking Declaratory Orders, in sum: (1) re-

Appellants filed their Complaint in the District Court for the District of Delaware on December 20, 1961, seeking to set aside the Commission's Orders dated September 28, 1959 and August 8, 1961 and to enjoin enforcement of the Commission's interpretation. The Defendants, including Intervenors,[13] filed Answers. Following Briefs and other pleadings by the parties and an oral hearing on May 21, 1962, the District Court issued its opinion (by Senior District Judge Rodney) September 19, 1962 and entered its Judgment Order on October 15, 1962.

The District Court sustained the Commission's finding that frozen french fried potatoes and other specifically named commodities were not unmanufactured agricultural commodities and found that these specific commodities were not intended by Congress to be within the "grandfather" rights created under the 1958 Act.[14] The District Court flatly held that the critical test under Section 203(b)(6) and the 1958 Act is whether a vegetable is cooked longer than necessary to inactivate enzymes, sus-

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stricting "grandfather" rights against the transportation of cooked frozen vegetables; and (2) requiring express provision of such a restriction in all "grandfather" authority issued. These Petitions were designated by the Commission as "No. MC-C-2708—*Petition For A Declaratory Order And Emergency Relief Grandfather Applications—Frozen Vegetables*" and "No. MC-C-2738—*Petition For A Declaratory Order And Emergency Relief*". Replies to these Petitions were filed in behalf of the Secretary of Agriculture and other parties, including those supporting the Petition in No. MC-C-2522. The Order of the Entire Commission dated August 3, 1961 denying reconsideration in No. MC-C-2522 also denied the petitions in Nos. MC-C-2708 and MC-C-2738. The Commission's refusal to enter Declaratory Orders in Nos. MC-C-2708 and 2738 has been held not to be reviewable. *Baldentine Produce, Inc. v. United States*, 209 F. Supp. 679 (W.D. Ark., Ft. Smith Div'n).

[13] Those parties listed in note 9, *supra*.

[14] The specific commodities covered by the District Court's decision are those set forth in note 3, *supra*.

taining the Commission's application of that test to the commodities specifically named.

After filing of the Notice of Appeal on November 24, 1962, the District Court, following oral argument, on December 6, 1962, entered an injunction pending disposition of this appeal.

THE QUESTIONS INVOLVED ARE SUBSTANTIAL

This case involves questions of great importance to processors of frozen vegetables,[11] to carriers transporting them,[12] and to the proper administration of Part II of the Interstate Commerce Act.

The ultimate question here is whether Appellant motor carriers and others similarly situated will be permitted to continue to transport all types of frozen vegetables or restricted against handling those which in the course of processing require cooking beyond the point necessary to inactivate enzymes. All frozen vegetables are cooked in the normal course of processing.[13] The only means by

[11] Otherwise, the District Court found the tests used by the Commission generally inapplicable to these named commodities. In addition, the District Court found the three tests set forth in the Commission's findings not reviewable without application to certain and named commodities considered by the Commission, suggesting that these tests be considered through a hearing on a "cease and desist" order if the occasion arises.

[12] There are approximately fifty food packers processing one or more of the frozen vegetables here involved.

[13] Approximately 500 motor carriers are transporting frozen vegetables pursuant to the "grandfather" rights created in Section 7(c) of the Transportation Act of 1958.

[14] As the Commission's Report stated, 81 M.C.C. 649, at 652:

> "Contrary to popular belief, all frozen vegetables produced by the principal packers of the country are cooked to some extent in that at some point in the processing thereof they are subjected to the application of heat in the form of hot water or steam for the purpose of inactivating certain enzymes."

which those here involved may be distinguished from other frozen vegetables specifically considered and found exempt by courts prior to the 1958 Act is in the degree of cooking.[19] Those previously held exempt were generally cooked only to the point of enzyme inactivation; those here involved are cooked beyond that point although none are completely cooked. Thus, this case turns upon determination of whether cooking a vegetable beyond the enzyme inactivation point creates a manufactured product outside the "frozen vegetables" for which the 1958 Act created "grandfather" rights. The Commission and the District Court considered the enzyme inactivation point critical; Appellants contend that it is a distinction without a difference which cannot sustain atomizing the service involved.

Stated concretely, as examples, the issue is whether Congress intended that "grandfather" motor carriers be permitted to continue handling frozen peas but not potatoes, summer squash but not winter squash, frozen beans if only cooked three minutes but not if cooked seven minutes and "pouch-packed".

Resolution of these issues is of vital concern to the continued well-being of "grandfather" motor carriers and to processors of frozen vegetables who depend upon their service.[20] All frozen vegetables are processed in similar and often common facilities. All frozen vegetables are

[19] Some frozen vegetables here may be distinguished from particular frozen vegetables previously held exempt by the medium in which preliminary cooking takes place and by the addition of foreign substances. However, such distinctions have not been regarded as critical respecting other commodities and the District Court here dismissed them.

[20] During 1961 there were 2,116,041,256 pounds of frozen vegetables processed in the United States, of which over one-fourth were in commodities here involved. *The Vegetable Situation*, 1963 Outlook Issue, October, 1962, United States Department of Agriculture, Economic Research Service, T.V.S. 146, page 37.

shipped to the same type customers often in mixed shipments in the same vehicle. The inability of a carrier to handle some varieties of these vegetables, therefore, seriously affects its ability to handle other varieties it concededly may lawfully transport.[2] The restrictive interpretation given by the Commission and the District Court would limit the varieties of frozen vegetables handled and thereby destroy the service of "grandfather" carriers of frozen vegetables, seriously disrupting that portion of the frozen food industry processing the varieties affected.

None of the particular frozen vegetables here involved was the subject of any court determination prior to the 1958 Act. Splitting operating rights for frozen vegetables based on whether cooked beyond enzyme inactivation is nothing more than giving the 1958 Act its most limited possible scope, refusing to include any vegetable not among those specifically held exempt in the *Home Transfer* case. There is nothing in the 1958 Act or elsewhere to support a restricted interpretation creating such drastic consequences for packers of frozen vegetables and "grandfather" motor carriers. Quite the contrary, the "grandfather" provisions were defended as a means of preventing, not causing, harm to such persons.[3]

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[2] In addition, the Commission has excluded from consideration in its "grandfather" proceedings shipments involving in part or in whole any frozen vegetable here involved, thus substantially reducing the territorial scope of the rights to which the Applicants are entitled (in some case resulting in denial of the entire application). *Panther Oil & Grease Manufacturing Co., Inc., Contract Carrier "Grandfather" Application*, 84 M.C.C. 393; *Home Transfer & Storage Co., Common Carrier "Grandfather" Application*, 88 M.C.C. 223.

[3] E.g., Speaking on the floor the Chairman of the House Committee on Interstate and Foreign Commerce (Mr. Harris) said, 104 *Cong. Rec.*, Daily Ed., Friday, June 27, 1958, page 13882: "They ["grandfather" motor carriers] will be permitted to continue the service they are now performing. Therefore, this

The District Court's opinion, citing and quoting from this Court's opinion in the *East Texas* case, defers to the Commission's judgment as an expert, finds the Commission's construction not unreasonable, and dismisses any resultant atomizing of the industry as "caused by the Act of Congress itself . . ." This Court, however, in the *East Texas* case and elsewhere has made it clear that courts are not required to defer to a Commission determination of its statutory powers. Unless compelled by the statutes, the fragmentation of service should not be sustained. The statute "should be liberally construed to preserve the position which those like [Appellant] motor carriers have struggled to obtain in our national transportation system." *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, at 488.

(1) *Section 7 Of The Transportation Act of 1958 Does Not Compel Or Support A Distinction Between Frozen Vegetables Based Upon Enzyme Inactivation.*

Congress could have subjected the transportation of commodities to regulation with or without a "grandfather" clause. *Milk Transport, Inc.* v. *United States*, 190 F. Supp. 850 (Minn.), aff'd *per curiam* 368 U.S. 5; *Midwest Emery Freight System, Inc.* v. *United States*, 202 F. Supp. 229 (N.D., Ill., E.D.). In the Transportation Act of 1958 Congress provided "grandfather" rights in Section 7(c) for the eleven commodities specifically named and made subject to regulation in Section 7(a). *Ibid.* As

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[frozen foods] industry would not be hindered or hampered in any way."

This expression by the floor manager of the Bill is especially significant since Congress was clearly apprised that many packers and motor carriers treated frozen vegetables here involved as well as others as exempt from regulation. E.g., *Hearings Before a Subcommittee on Interstate and Foreign Commerce on H.R. 5828*, 85th Cong., 2d Sess., at 530; *Problems of the Railroads, Hearings Before the Subcommittee on Surface Transportation of the Committee on Interstate and Foreign Commerce*, United States Senate, 85th Cong., 2d Sess., at 2397.

the District Court stated in distinguishing the issues here from prior cases:

> In these *Milk Transport* and *Midwest* cases, however, the goods in question could not, even arguably, be said to be included in the 11 commodities vested with grandfather rights. Conversely here, as the plaintiffs argue, all the frozen foods in question might be included under the general head "frozen vegetables," which is one of the 11 commodities mentioned in the Statute.

Since all commodities here involved are within the ordinary meaning of "frozen vegetables," the language of Section 7 *per se* could be considered as conferring "grandfather" rights respecting them. The District Court opinion, however, finds not unreasonable a conclusion that Congress intended thereby to cover only those frozen vegetables whose processing involved no cooking beyond the enzyme-inactivation point. This finding is based upon a series of assumptions, each of which is open to question, and each of which serves only to rationalize atomizing the service.

The District Court opinion at no point considers directly whether the words "frozen vegetables" in Section 7(a) are to be taken at face value. Nevertheless, the District Court's opinion finds support for the enzyme inactivation distinction in Administrative Ruling No. 107. Whatever else may be true, it is clear that Administrative Ruling No. 107 had no force or effect prior to or apart from the Transportation Act of 1958. Prior to that Act the Administrative Ruling was no more than an informal opinion of a Bureau of the Commission.[1] Since the 1958 Act

[1] The headnote of Administrative Ruling No. 107 includes the following:

> "The Bureau opinions in this ruling are tentative and provisional and are made either in the absence of authoritative Commission or court decisions or in applying the holdings and reasoning of court decisions which have reversed or altered past general and specific findings of the Commission."

could not and did not apply retrospectively, its terms, including Administrative Ruling No. 107, are not determinative of the status of any commodity prior to the date of adoption of the 1958 Act. Thus, assuming that the Commodity List in Administrative Ruling No. 107 were unequivocal with respect to the status of given frozen vegetables, its adoption would in no way have altered the prior status of any frozen vegetable.

Further, the very meaning attributed by the District Court to the terms used in Administrative Ruling No. 107 shows that Congress could not have intended in the 1958 Act to distinguish vegetables based on the enzyme inactivation point. The District Court assumes that Administrative Ruling No. 107 drew the line at the enzyme inactivation point by characterizing "cooked vegetables" as nonexempt and "fresh frozen vegetables" as exempt.[24] If this were so, then Congress' use of the term "frozen vegetables" is without explanation. The very fact that Congress did use the term "frozen vegetables" in the same statute in which it referred to Administrative Ruling No. 107 strengthens rather than diminishes the force of the argument that Congress intended all frozen vegetables to be covered by "grandfather" rights.

The arguments purporting to base the enzyme inactivation distinction on the terms of the 1958 Act are, as seen,

[24] The source of the meanings attributed in the District Court's opinion to these terms used in Administrative Ruling No. 107 is a complete mystery. In the Administrative Ruling the *Home Transfer* case was cited as support for characterizing "fresh frozen vegetables" as exempt. There was no explanation given of the term "cooked vegetables" and no authority cited in the Administrative Ruling for the characterization given other than "Bureau opinion".

Administrative Ruling No. 107 did characterize french fried potatoes and frozen candied sweet potatoes as "not exempt", citing two Commission decisions, one (*Midwest Coast Transport, Inc., Extension—Montana*, 74 M.C.C. 1) relying upon the other (*Hughes Extension—Frozen Foods*, 71 M.C.C. 457) which the Ruling itself recognized was not authoritative.

wholly circular in character based upon assuming the very conclusion at issue. Indeed, the required assumptions ignore the precise language used in the Act which clearly and simply supports the conclusion that Congress had no intention of differentiating between frozen vegetables but rather intended to include them as a class and to provide "grandfather" rights respecting the class.

(2) *Cooking Beyond The Enzyme Inactivation Point Did Not Affect The Exempt Status Of A Frozen Vegetable Prior To The Transportation Act of 1958.*

A commodity otherwise falling within the terms of those specifically declared nonexempt in Section 7(a) of the Transportation Act of 1958 could conceivably be deprived of "grandfather" rights under Section 7(c) on the ground that the commodity was subject to regulation prior to the 1958 Act and, hence, not "made subject" to regulation by that Act. These proceedings were undertaken before the Commission in order to foreclose such a possibility respecting so-called cooked frozen vegetables by obtaining a determination *nunc pro tunc* of their status prior to the 1958 Act. The Commission, however, based its determination upon criteria whose only function was to distinguish these frozen vegetables from those judicially held exempt prior to the 1958 Act.

Neither the Commission nor the District Court employed the "continuing substantial identity" test found appropriate by this Court in the *East Texas* case. Instead, they employed a chemical test based upon whether the particular frozen vegetable is cooked beyond the enzyme

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[25] Congress had no difficulty in Section 7(a) in drawing distinctions between different forms of products when so intended. E.g., "cooked or uncooked (including breaded) fish or shell fish when frozen or fresh (but not including fish and shell fish which have been treated for preserving, such as canned, smoked, pickled, spiced, corned or kippered products) . . . ."

inactivation point. Cooking a vegetable beyond this point does not alter its physical appearance or identity from a marketing standpoint. At most a chemical change occurs which may only be determined by chemical analysis.

The frozen vegetables here involved are cooked beyond the enzyme inactivation point but so also are other forms of processed vegetables which even the Commission has not considered to be a manufactured product.[26] None of the frozen vegetables here involved is fully cooked; all require further cooking prior to eating just as do the frozen peas and other frozen vegetables specifically found exempt in the *Home Transfer* case.

Both the Commission and the District Court seized as significant the reference in the *Home Transfer* case to the vegetables there before the Court, 141 F. Supp. 599, at 602:

> The processing of fresh vegetables for quick freezing is to heat them, in some instances after first splitting them to hasten heat action, sufficiently to kill the enzymes, and then to follow with the desired degree of freezing.

A reading of this quote gives no indication that the Court there intended that further heating would change the status of a vegetable.[27] Here, the only possible distinction between the frozen pouch-packed beans, peas, spinach, broccoli, and asparagus considered "manufactured products" and those same vegetables held exempt in the *Home Transfer* case is the added heating made necessary by

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[26] E.g., dehydrated vegetables which Administrative Ruling No. 107 termed exempt.

[27] Actually, the District Court for the Southern District of Texas in *Frozen Food Express v. United States*, 148 F. Supp. 399, expressed the view that canning might well be the point at which processing merges with manufacturing.

use of the pouch.[1] The remaining factors [illegible] involved are simply the [illegible] it varies [illegible] onions, and with [illegible] the processing [illegible] might [illegible]

The Commission [illegible] converted [illegible] agricultural commodity into a non-exempt manufactured product. Having been overruled by judicial interpretation of Section 203 (b) (6) on this point, the Commission nevertheless sought to distinguish frozen fruits and vegetables, arguing to this Court:

> In contrast with the purely mechanical killing and dressing of poultry, we submit that the addition of chemicals to fruit and *the partial cooking of vegetables* before freezing, involves more than "incidental processing" and that processing and manufacturing have merged to create products different in quality and form. (emphasis supplied.)

Having been unsuccessful with the theory that partial cooking produces a "manufactured product", the Commission here refined its approach by relying upon the degree of cooking before freezing. This artificial distinction, like the others which preceded it, makes no substantive difference. The so-called cooked frozen vegetables here

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[1] The resistance of the pouch to heat transfer requires additional cooking prior to packaging to render this form of frozen vegetable marketable.

Compare this Court's comment in the *East Texas* case, 351 U.S. 49, at 54:

> "We cannot conclude that this processing which merely makes the chicken marketable turns it into a manufactured commodity."

Determination of Exempted Commodities, 52 M.C.C. 511.

The *Keeblin* and *East Texas* cases cited note 4, *supra*.

Jurisdictional Statement of the Interstate Commerce Commission in No. 365, October Term, 1956, *Interstate Commerce Commission v. Hoage Transfer & Storage Co., Inc.*, at page 9.

involved retain their continuing substantial identity through the processing stage just as do the frozen vegetables judicially determined to be exempt agricultural commodities prior to the 1958 Act. These frozen vegetables were likewise exempt prior to the 1958 Act; they were made subject to regulation by that Act and were included among those for which that Act created "grandfather" rights.

CONCLUSION

To the end that the service provided by "grandfather" motor carriers of frozen vegetables not be atomized or limited by artificial distinctions unrelated to statutory language or purpose, plenary consideration of the issues, with briefs and oral argument, is required.

Respectfully submitted,

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APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

LESTER C. NEWTON TRUCKING COMPANY, a corporation, ET AL.,
Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants.

H. James Conaway, Jr., Esq. and Samuel R. Russell, Esq. (Morford, Young and Conaway), Wilmington, Del.; H. Charles Ephraim, Esq.; Washington, D. C., and William J. Augello, Jr., New York, N. Y., for plaintiffs.

Alexander Greenfeld, Esq., United States Attorney, and Stanley C. Lowicki, Esq., Assistant U.S. Attorney, Wilmington, Del., for defendant United States of America.

Fritz R. Kahn, Esq., Washington, D. C., for defendant Interstate Commerce Commission.

Joseph H. Geoghegan, Esq., (Berl, Potter & Anderson), Wilmington, Del., R. Edwin Brady, Esq., Washington, D. C., Harry J. Breithaupt, Jr., Esq., Washington, D. C.; T. Randolph Buck, Esq., Richmond, Va.; James G. Lane, Esq., Boston, Mass., James W. Nisbet and Ed White, both of Chicago, Ill., Carl Helmetag, Jr. Esq., Philadelphia, Pa. and J. Edgar McDonald, Esq., New York, N.Y., attorneys for intervening railroad and trucking defendants.

BIGGS, Circuit Judge, LAYTON, District Judge, and RODNEY, Senior District Judge.

RODNEY, Senior District Judge.

This is an action pending before a Three Judge Court convened pursuant to 28 U.S.C. §§ 2281-2284 and 2321-2325. The case seeks injunction relief restraining the enforcement, operation or execution of an order of the Interstate Commerce Commission and calls for an interpretation of a provision of the Interstate Commerce Act,[1] as amended by Section 7 of the Transportation Act of 1958.[2]

The present matter had its origin on February 5, 1959 in a petition of the National Association of Frozen Food Packers and some 35 other associations, packers and carriers to the Interstate Commerce Commission for a Declaratory Order that carriers of frozen cooked vegetables, such as french fried potatoes, had been exempt from regulation by the Interstate Commerce Commission prior to the Transportation Act of August 12, 1958.

The petition was filed pursuant to Sec. 5 (d) of the Administrative Procedure Act, 5 U.S.C. § 1004 (d), and was opposed by some 25 railroad and other organizations.

The matter was referred to an examiner, who took considerable testimony on April 27 and 28, 1959. Without a report from the examiner, the Commission considered the petition for a declaratory order as discretionary and deemed it not necessary. The Commission treated the petition as calling for an interpretive order and this was issued September 28, 1959 designated MC-C-252[illegible] In this order the Commission concluded and found:

> "that the term 'agricultural (including horticultural) commodities (not including manufactured products thereof)' as used in section 203 (b) (6) of the Interstate Commerce Commission [sic] Act prior to the amendment thereof by the Transportation Act of 1958, did not include frozen french fried potatoes, frozen ris-

[1] 49 U.S.C. § 303 (b) (6).

[2] 72 Stat. 573.

sole potatoes, frozen potato puffs, frozen candied sweet potatoes, frozen whipped potatoes, frozen french fried onion rings, frozen precooked pouch-packed vegetables in general, and frozen precooked pouch-packed vegetables with sauce in particular."

The Commission further concluded and found:

"that such term did not include any vegetable which has been cooked in water or steam for a period longer than that necessary for the inactivation of the enzymes; any frozen vegetable which has been cooked by immersion in oil or fat; or any vegetable product the ingredients of which include vegetable matter combined with other commodities."

The petitioners filed a petition for reconsideration and at the same time other parties filed petitions for a declaratory order with reference to the general subject matter designated as MC-C-2708 and MC-C-2738. All three petitions were denied by the Commission by order dated August 3, 1959 and this action concerning solely MC-C-2522 followed.

It will be seen that this case does not come before the Court in the nature of an appeal from a definitive order as applicable to any particular party but calls in question an interpretive opinion of the Commission by which the Commission gives its general interpretation of the Statute.

A somewhat similar order of the Commission was considered in Frozen Food Express v. United States, 128 F. Supp. 374. There in a proceeding instituted by the Commission itself, the Commission made an investigation of the meaning of the statutory language and issued its findings. The District Court held that such findings of the Commission did not constitute such an "order" from which an appeal could be taken. The Supreme Court in Frozen Food Express v. United States, 351 U.S. 40, reversed the holding of the District Court, Justice Harlan dissenting. While some differences appear between that

case and the present, yet the close similarity of the matter involved requires that jurisdiction be now assumed and the matter further investigated.

The Statute giving the Interstate Commerce Commission jurisdiction over motor vehicles provided:

> "Nothing in this chapter * * * shall be construed to include motor vehicles used in carrying * * * agricultural commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property * * *."[3]

This exemption of agricultural products from the application of the Act "was designed to preserve for the farmers the advantage of low cost motor transportation,"[4] and "manufactured" products were excepted from the exemption.

Many difficulties arose both in the Commission itself and in the courts in determining what products were properly termed "agricultural products" and what were "manufactured" and incessant demands were made for a clarification of the statute.

On March 19, 1958 the Interstate Commerce Commission filed a comprehensive administrative ruling No. 107 concerning the status of various commodities under the partial exemption of Section 303 (b)(6) of the Interstate Commerce Act, as found in 49 U.S.C. In this document were listed all of the opinions of the various courts, the holding of the Commission itself and the Bureau opinions indicating as to each commodity whether it was considered "exempt" or "not exempt."

Congress in answer to repeated demands for clarification of the Statute acted quickly. By Act approved Au-

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[3] 49 U.S.C. § 303 (b)(6).

[4] East Texas Lines v. Frozen Food Express, 351 U.S. 49, 51.

gust 12, 1958 it adopted the Ruling 107 of the Interstate Commerce Commission in the following language (eliminating language immaterial to the present question):

> "(a) * * * Provided, That the words * * * agricultural * * * commodities (not including manufactured products thereof) as used herein shall include property shown as 'exempt' in the 'Commodity List' incorporated in the ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, but shall not include property shown therein as 'Not exempt' *Provided further however*, That notwithstanding the preceding proviso the words * * * agricultural * * * commodities (not including manufactured products thereof) shall not be deemed to include * * * *frozen vegetables*."

The Amendment in addition to "frozen vegetables" goes on to list ten other specific commodities that shall be treated as not exempt. The Congressional intention was to determine the agricultural exemption at its then level and then to accomplish a "roll back" to remove certain articles from the exemption. To accomplish the former they adopted the Commission's Ruling 107 as determinative of what was or was not then exempt and to effect the latter they listed 11 specific types of commodities that had been held "within the exemption" and would be "returned to regulation."

It will thus be seen that while "agricultural products" had been exempt from the operation of the original Act then by this Amendment the term "frozen vegetables" was returned to regulation. If legislation had ceased at this point, the present questions would not be presented.

A later subsection of the Amendment established the so-called "grandfather rights" which required the Commission to issue an operating permit without a hearing

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[5] Section 7 of the Transportation Act, Public Law 85-625, 72 Stat. 573.

on public convenience and necessity to certain persons indicated in Section (c) as follows:

> "(c) Subject to the provisions of Section 210 of the Interstate Commerce Act, if any person (or its predecessor in interest) was in bona fide operation on May 1, 1958, over any route or routes * * * in the transportation of property for compensation by *motor vehicle made subject to the provisions of part II of that Act by paragraph (a) of this section*, in interstate or foreign commerce, and has so operated since that time * * * the Interstate Commerce Commission shall without further proceedings issue a certificate or permit, as the type of operation may warrant, * * *". (Emphasis supplied)

This certificate or permit was to be "issued" if application therefor was made within a stipulated time which we understand was complied with.

It is the italicized portion of this Section that is here in question.

The gist of the plaintiffs' claim is that motor vehicles transporting the indicated commodities, viz., frozen french fried potatoes and the other commodities listed in the footnote,[1] were exempt or entitled to be exempt from regulation by the Interstate Commerce Commission immediately prior to the Amendment of 1958 and were made subject to the provisions of the law by the Amendment. As a consequence, the plaintiffs contend they are entitled to the benefit of the grandfather clause and to a certificate from the Interstate Commerce Commission without a showing of "public convenience and necessity."

The defendants contend that two cases are dispositive of the plaintiffs' claim. The first, Milk Transport, Inc. v. I. C. C., 190 F.Supp. 350, affirmed per curiam, 368 U.S.

[1] Frozen rissole potatoes, frozen potato puffs, frozen whipped potatoes, frozen candied sweet potatoes, frozen winter squash, frozen french fried onion rings, frozen "pouch-pack" vegetables.

5, involved an application by transporters of citrus juices for a grandfather permit. Administrative Ruling 107 had listed the commodity as "not exempt" prior to the 1958 Amendment. Plaintiff in the cited case contended that citrus juices had, in fact, been entitled to exemption prior to 1958, were first made subject to the regulation by the Amendment and were entitled to grandfather rights. The Court refused to adopt this theory, however, saying the Congress' adoption of Ruling 107 was conclusive in deciding that citrus juices had been "not exempt" prior to 1958 regardless of whether a court might have held otherwise had the question ever reached them before the Amendment and regardless of whether the transportation in citrus juices was in practice actually regulated before 1958. The Court held the grandfather provision in Section C applied only to the 11 commodities specifically listed in Section A as being returned to regulation and these were the only items made subject to regulation by the Amendment itself. Since none of these 11 commodities included citrus juices, the petition was denied.

An identical situation involving crude rubber arose in the second case cited by the defendants. Midwest Emery Freight System, Inc. v. United States, 202 F.Supp. 220. The Court there treated the citrus juice case as controlling and reached the same result.

In these cases, however, the goods in question could not, even arguably, be said to be included in the 11 commodities vested with grandfather rights. Conversely here, as the plaintiffs argue, all the frozen foods in question might be included under the general head "frozen vegetables," which is one of the 11 commodities mentioned in the Statute.

It will thus be seen that the ultimate question to be decided by this Court is whether frozen french fried potatoes (and the other commodities mentioned in footnote

6) were declared exempt by the Amendment of 1958 of the Transportation Act which incorporated Ruling 107 of the Interstate Commerce Commission.

It seems clear that "cooked" vegetables were expressly named as not exempt in Ruling 107 specifically adopted by Congress in the Amendment of 1958.

Certain specified vegetables frozen under indicated and limited circumstances were considered in Home Transfer & Storage Co. v. United States, 141 F.Supp. 599 and held exempt. This case was affirmed in 352 U.S. 884.

It appears that fresh frozen fruits or vegetables are, prior to the freezing process, subjected to blanching or to heat, to such a degree as will inactivate the enzymes. So in the Home Transfer & Storage case the Court held that the application of the degree of heat indicated is adequate to inactivate the enzymes and the subsequent quick freezing of the vegetables did not essentially change their character.

The Interstate Commerce Commission by its interpretive opinion concludes that the vegetables herein enumerated being cooked beyond the point required to inactivate the enzymes have been so materially changed in texture from the original vegetable as it came from the field as to make them subject to the control by such Commission.

The Home Transfer & Storage Case, 141 F.Supp. 599, affirmed 352 U.S. 884, seems to furnish the chief basis of the plaintiffs' claim that "frozen vegetables" as such were exempt prior to the passage of the 1958 Amendment.

The Home case, however, did not hold that "frozen vegetables" as such were exempt from control by the Interstate Commerce Commission. What it did hold was that fresh vegetables which had been subjected only to quick freezing were exempt. The Court explained the term "quick freezing" by stating:

"The processing of fresh vegetables for quick freezing is to heat them, in some instances after splitting them to hasten heat action, sufficiently to kill the enzymes, and then to follow with the desired degree of freezing."

Succinctly then this problem is thus presented.

Ruling 107 of the Interstate Commerce Commission, specifically adopted by Congress, provides that cooked vegetables are not exempt and were not exempt prior to the Amendment of 1958. Ruling 107 also provides that "vegetables, frozen, fresh" were exempt under the Home Transfer & Storage case.

These provisions are of equal weight and validity and both must receive full recognition by this Court. It is clear that some construction must be adopted to harmonize and give effect to both provisions. The authoritative ruling that held that frozen vegetables were exempt was the Home Transfer case. That case, however, held that the vegetables there concerned by mere blanching to the point of inactivation of the enzymes and then frozen remained essentially in the same shape and form as non-processed vegetables. In effect the Court held that the blanching merely to the point of destroying the enzymes and then freezing did not change their character as fresh vegetables. This then constitutes the line of demarcation and gives effect to each provision of the statute. Any other conclusion does violence to the express Act of Congress. A conclusion that any blanching or cooking of a vegetable destroys the exemption provided by Congress is contrary to the express language of the Home Transfer case, as affirmed by the Supreme Court. A determination that unrestricted cooking followed by freezing creates an exemption is directly contrary to the conclusion reached by the Interstate Commerce Commission as indicated in the Ruling 107 and expressly adopted by Congress, which said that "cooked vegetables" were not exempt.

"The Interstate Commerce Commission is the expert in the field of transportation. And its judgment is entitled to great deference because of its familiarity with the conditions of the industry which it regulates." The Commission has adopted the view of the Supreme Court that cooking vegetables to the point of inactivation of the enzymes and then freezing them leaves such vegetables as frozen fresh vegetables and exempt from regulation. The Commission has concluded that cooking vegetables beyond the point indicated and then freezing them makes them fall within the classification of "cooked vegetables" which Congress has said are not exempt.

We cannot say that the construction put upon the Statute by the Commission is unreasonable. Indeed, it would be difficult to phrase a different result without doing violence to the indicated intention of Congress.

Objection is made by the plaintiffs that the result of the conclusion of the Commission is to atomize or fragmentize the industry. If this be true, the result is caused by the Act of Congress itself and the remedy must there be sought.

This case has certain peculiarities. Essentially it is in the nature of an appeal from an interpretive order of the Interstate Commerce Commission. That interpretive order first dealt with certain specific frozen vegetables deemed to be involved in the proceeding before the Commission. These particular frozen vegetables and the holding of the Commission are set out at the beginning of this opinion. The Commission thus held that the indicated commodities were subject to regulation. To this extent the matter seems clear and the correctness of the holding of the Commission capable of determination.

The Commission, however, went further and set out three criteria which they indicated might be applied in

East Texas Lines v. Frozen Food Express, 351 U.S. 49

the future as to agricultural products in general. This portion of the interpretive order was as follows:

> "'We further conclude and find that such term 'agricultural commodities' (not including manufactured products thereof) did not include any frozen vegetable which has been cooked in water or steam for a period longer than that necessary for the inactivation of the enzymes; any frozen vegetable which has been cooked by immersion in oil or fat; or any vegetable product the ingredients of which include vegetable matter combined with other commodities."

The plaintiffs, in answer to an inquiry by the Court, indicate that they are of the opinion that this Court should pass upon the validity of each criterion, in addition to the matter specifically before the Commission. This position is opposed by the defendants.

It is conceded that each one of the specific frozen vegetables mentioned in the proceedings before the Interstate Commerce Commission and now before this Court comes within the first criterion, viz: that each commodity had been cooked in water or steam for a period longer than that necessary for the inactivation of the enzymes. The Commission was of the opinion that these commodities were not exempt prior to the Amendatory Act of 1958 and therefore not entitled to the benefits of the "grandfather" rights provided by Sec. C of the Act and were subject to regulation. As indicated herein, we agree with this conclusion and so hold.

Insofar as the first criterion refers to and determines the status of commodities then before the Interstate Commerce Commission, we think it such an "order" as to form the basis of this action. This we think is in accordance with Frozen Food Express v. United States, 351 U.S. 40. Insofar as the first criterion refers to the status of commodities not before the Commission or considered by it, we do not think it such an "order" as to form the basis of injunctive proceedings or proceedings in

the nature of appeal but rather as an indication of probable course of future conduct if occasion should arise. So, too, of the two remaining criteria, viz., "any frozen vegetable which has been cooked by immersion in oil or fat" or any vegetable product "combined with other commodities." Few of the commodities here involved are included in either of these criteria. No substantial testimony concerned either. The criteria contemplated application in the future to uncertain and unnamed commodities which have not been considered by the Commission.

We think that questions arising from the criteria and especially their application to commodities which have received no consideration by the Commission may more properly be directly presented upon a hearing on a "cease and desist" order if such occasion arises. This was the appropriate procedure suggested by Justice Harlan in 351 U.S. 40.

Findings of fact and conclusions of law are set out in this opinion in accordance with Rule 52(a), Fed. R. Civ. Proc., 28 U.S.C.

We approve the explicit holding of the Interstate Commerce Commission as to the commodities there considered and must refuse the injunction prayed for and dismiss the complaint.

An appropriate order may be submitted.

At: Wilmington, Del.

Dated: September 19, 1962.

APPENDIX "B"

INTERSTATE COMMERCE COMMISSION

No. MC-C-2522

FROZEN COOKED VEGETABLES—STATUS

Decided September 28, 1959

The term "agricultural commodities (not including manufactured products thereof)" as used in section 203(b)(6) of the Interstate Commerce Act prior to the enactment of the Transportation Act of 1958, construed as not embracing certain frozen cooked vegetables and frozen cooked vegetable products. Proceeding discontinued.

W. J. Augello, Jr., W. S. Pilling, Dale C. Dillon, and *Jack M. Carter* for petitioners.

Harry J. Brithaupt, Jr., Ed White, R. Edwin Brady, T. Randolph Buck, Alfred S. Knowlton, James M. Walsh, James G. Lane, James E. Wilson, Thomas J. Healy, F. X. Masterson, and *David G. McDonald* for interveners in opposition to the relief sought.

REPORT OF THE COMMISSION ON PETITION

DIVISION 1, COMMISSIONERS MURPHY, GOFF, AND WEBB

BY DIVISION 1:

By a petition filed February 5, 1959, the National Association of Frozen Food Packers and certain other organizations noted in appendix A hereto seek a declaratory

order construing the term "agricultural (including horticultural) commodities (not including manufactured products thereof)" as used in section 203 (b) (6) of the Interstate Commerce Act as including frozen cooked vegetables, such as french fried potatoes, prior to the enactment of the Transportation Act of 1958.

The issues raised by the petition were assigned for hearing, and petitioners were instructed to describe the frozen cooked vegetables which are the subject of the petition and to present evidence concerning the processing of the vegetables prior to their tender for transportation by motor vehicle. All interested parties were invited to appear at the hearing and present evidence. Hearing was held at Washington on April 27 and 28, 1959, at which time a number of additional organizations, also noted in appendix A, joined in the petition, and the organizations listed in appendix B entered appearances in opposition to the relief sought by petitioners. Briefs have been filed.

Petitioners are packers of frozen foods, associations of such packers, and motor carriers engaged in the transportation of frozen foods. Those opposing the petition are rail carriers, rail carrier organizations, motor carriers engaged in the transportation of frozen foods, and national motor-carrier organizations, all of which will hereinafter be called protestants.

Section 7 (a) of the Transportation Act of 1958, which became effective August 12, 1958, amended section 203 (b) (6) in such a manner as to place under economic regulation the motor transportation of certain commodities the transportation of which had theretofore been considered exempt from all provisions of the act except those relating to qualifications and maximum hours of service of employees or standards of equipment. It should be noted with particularity, however, that this proceeding is not concerned with the status of the motor transporta-

tion of the commodities here involved under the provisions of section 203 (b) (6) as amended, but rather to their status prior to the amendment. All of the parties agree that motor vehicles used in the transportation of frozen vegetables, whether cooked, partially cooked, or uncooked, are now subject to economic regulation by this Commission. Since there is no question as to the present status of the commodities involved, there arises the question as to the purpose of petitioners in seeking the declaratory order with which we are here concerned, relative to the status of such commodities prior to the enactment of the Transportation Act of 1958. The petition itself is vague and indefinite in this respect. The only conceivable reason for the relief sought is found in the provisions of section 7 (c) of the Transportation Act of 1958, which provides so-called "grandfather" rights with respect to carriers which were, on May 1, 1958, and continuously thereafter, engaged in bona fide operation in the transportation of property made subject to the provisions of part II of the Interstate Commerce Act by the Transportation Act of 1958; namely, property which, although therefore exempt from economic regulation, was brought under such regulation by the amendment of section 203 (b) (6).

Section 203 (b) (6), prior to its latest amendment, provided exemption from economic regulation with respect to motor vehicles used in carrying property consisting of "agricultural (including horticultural) commodities (not including the manufactured products thereof)" if such motor vehicles were not used in carrying any other property, or passengers, for compensation. This Commission has always construed such exemption strictly, and, insofar as particularly pertinent here, has consistently held to the view that the elaborate processes by which field grown vegetables are converted into a frozen pack, such as generally found in retail grocery stores, constitute a manufacturing process sufficient to remove the end product from the exemption. However, in *Home Transfer & Storage*

Co. v. *United States*, 141 F. Supp. 599, affirmed, 352 U.S. 884, the court set aside a prior order of the Commission insofar as it would have restricted plaintiff's right to transport frozen "fresh" fruits and frozen fresh vegetables, and we adhered to the views expressed in that case. We are now asked by petitioners to determine, *nunc pro tunc*, that the exemption described was, prior to the enactment of the Transportation Act of 1958, equally applicable to frozen "cooked" vegetables.

Briefly, it is the contention of petitioners that all frozen vegetables, as packed by the frozen food industry, are at least partially cooked; that the difference between those frozen vegetables generally considered to be fresh and those generally considered to be cooked is merely one of degree; and that there is no proper basis for distinguishing between the fresh and cooked products insofar as concerns the exemption provided in section 203 (b) (6). Petitioners further urge that since many frozen food packers produce and ship both cooked and uncooked items, we should abolish the distinction heretofore observed in the interests of removing the confusion and inconvenience attendant upon the observance of such distinction. On the other hand, protestants argue that cooked vegetables have never been included within the scope of the exemption; that the Commission is without power retroactively to declare such items as having been exempt at some time in the past; that to take such action would have the effect of amending the provisions of the Transportation Act of 1958, clearly beyond the intent of the Congress and also of amending the law as it existed prior to the enactment of such act; and that the petitioners are actually here seeking to effect an amendment to the "grandfather" provisions of such act contrary to the intent of Congress.

Evidence in support of the petition was submitted by representatives of J. R. Simplot Company, General Foods Corporation (Birds Eye Division), Seabrook Farms Com-

pany, hereinafter called Simplot, General Foods, Bird's Eye, and Seabrook Farms, Snow and Frosty, L. [illegible] and Mrs. Paul's Kitchens, packers of frozen vegetables, as well as the National Association of Frozen Food Packers and the Pacific Intermountain Express Company. Evidence in opposition to the petition was submitted by a food consultant specializing in the field of food technology, the Bangor and Aroostock Railroad Company, and Refrigerated Food Express, Inc., a motor common carrier. Most of the technical evidence submitted concerns frozen potato products, particularly frozen french fried potatoes, and consists of a comparison between the processing of such items and the processing of so-called frozen fresh vegetables such as peas, asparagus, corn, or celeta. The technical evidence is embraced primarily in the testimony of three persons representing Simplot, Seabrook Farms, and General Foods (Birds Eye Division), and the above-mentioned food consultant retained by protestants. These technical witnesses have all had a considerable amount of education and experience in the frozen food field and all are eminently qualified to testify concerning the technical matters here involved.

Contrary to popular belief, all frozen vegetables produced by the principal packers of the country are cooked to some extent in that at some point in the processing thereof they are subjected to the application of heat in the form of hot water or steam for the purpose of inactivating certain enzymes. This process is generally called "blanching," although there is some indication that it might more appropriately be called "parboiling." The time required to inactivate the enzymes by the blanching process varies depending upon the nature of the vegetables. Green peas packed by Birds Eye are blanched for only 1 minute, but whole kernel corn is blanched up to 10 minutes and corn on the cob for up to 14 minutes. The recommended home-cooking time for the peas is from 5

to 7 minutes, thus the blanching time represents only a small portion of the complete cooking process. On the other hand, the blanching time of the corn, with a recommended home-cooking time of only 2 minutes, represents a substantial portion of the complete cooking process. It is difficult to evaluate the ratio between the blanching time and the home-cooking time because the latter is dependent to some degree upon the personal preference of the consumer, and such difficulty is increased in the case of those vegetables with respect to which the home-cooking medium is different from the blanching medium, as where the blanching medium is hot water and the home-cooking medium is by heating in an oven.

The principal difference between the processing by the packer of the so-called frozen fresh vegetables and those commonly referred to as frozen cooked vegetables is in the application of heat beyond that necessary, merely for the inactivation of the enzymes and the addition of foreign substances not found in the natural vegetable. Evidence was submitted concerning the processing of the following frozen cooked vegetables and vegetable products: French fried potatoes, popularly called french fries, rissole potatoes, potato puffs, whipped potatoes, candied sweet potatoes, winter squash, french fried onion rings, and so-called pouch-packed vegetables in general.

French fries are prepared by cutting potatoes which have been peeled and trimmed into various sized strips of random lengths, or cutting them in a special form known as "crinkle cut," after which the pieces are blanched in hot water for approximately 3 minutes and submerged in deep fat (usually vegetable oil) for approximately 1' minutes. The submersion in oil is frequently called "oil blanching" in the industry. The resultant product is then cooled by air to a temperature of approximately 80 , packaged, and frozen. The time figures given vary somewhat depending upon the type of potato used (such as

Maine and Idaho potatoes and the packer involved. The end product has at least a coating of oil and the natural starch has been expanded materially. The testimony of record indicates that the oil absorption ranges from 1 to 11 percent by weight, and that the starch expansion ranges up to 80 percent. Rissole potatoes are whole potatoes which have been subjected to the water and oil blanching referred to above. Those produced by Seabrook Farms are blanched in steam for 6 minutes and submerged in oil for 5 minutes.

Potato puffs are produced by cutting the potato into small pieces, submerging the pieces in hot water or subjecting them to steam for a substantially longer period than the time indicated above for the blanching of french fries, mashing the pieces into a mass to which is added a binder and seasoning, extruding the mass through a pressure nozzle into small balls or puffs, and submerging the puffs into hot oil. Birds Eye puffs are subjected to steam for 17 minutes and submerged in oil for 1½ minutes. Birds Eye labels state that the ingredients include whole eggs, flour, margarine, onion powder, and salt. Whipped potatoes are produced by cutting the whole potato into pieces, subjecting the pieces to steam for approximately 11 minutes, adding powdered milk and seasoning, and mashing or whipping.

Candied sweet potatoes, as produced by Mrs. Paul's Kitchens, are prepared by boiling the peeled potatoes for 19 minutes, after which they are cooled, frozen, packaged, and sprinkled with a powdered sweetener which becomes the candy coating when the potatoes are heated in an oven. It is estimated that the potatoes are 75-percent cooked by the 19 minute boiling process.

Winter squash (Hubbard squash) has a hard skin and compact solid flesh. It cannot be marketed without considerable cooking. It is cooked in steam for periods ranging from 30 to 45 minutes and then passed through a comminuting

machine which reduces the edible "flesh" to a mass and also removes the inedible portions such as the seeds and the fibers present in the seed cavity.

French fried onion rings are produced by peeling and slicing the onion, separating the slices into rings, applying heat to the rings either by steam or oil, covering the slices with a batter, and then frying them in oil. Birds Eye's rings are blanched in steam for about a minute. Mrs. Paul's rings are blanched in oil for about 90 seconds. Onions require less blanching time than most vegetables.

The so-called pouch-packed vegetables are precooked vegetables packed in a plastic bag and are designed to be home cooked in the bag or pouch. Shoreland Freezers produces what it calls fresh-frozen vegetables and also what it calls frozen precooked vegetables, the latter of which are packaged in the manner indicated above. For comparison, it might be noted that the so-called fresh green beans produced by this company are blanched for 2½ to 3 minutes, whereas the pouch-packed beans receive a blanching and precooking treatment consuming from 7 to 8 minutes. In each instance the recommended home-cooking time is substantially the same. The precooking time of the items is varied in such a manner that the home-cooking time of all is the same. Pouch-packed vegetables distributed by Birds Eye are produced substantially in the same manner as those of Seabrook Farms, except that Birds Eye adds a sauce to its products. For example, it produces lima beans with a cheese sauce, broccoli au gratin, potatoes with a cream sauce containing pimento, and creamed spinach. The sauces are added after the precooking process and it is claimed that they do not permeate the vegetables until home cooked in the pouch.

It is contended by petitioners that none of the so-called cooked vegetables are completely cooked, and that all require some additional application of heat in the home-preparation process. There is considerable doubt as to

this contention, particularly insofar as certain of the items are concerned, but we think the matter is unimportant. Clearly, each has been subjected to sufficient heat beyond the blanching stage in water or steam to inactivate the enzymes for quick freezing as observed by the Court in *Home Transfer & Storage Co. v. United States, supra*, materially to effect a substantial change in the texture of the vegetable as it comes from the field, and, in our opinion, each may be properly classified as a product which has acquired "a new identity with new properties, and is devoted to new and different uses than its original principal ingredient." In fact, they are generally so classified in the industry. The Birds Eye label for french fried potatoes, for example, indicates that they have been deep fried in vegetable shortening and are ready to heat and serve. Birds Eye's potato puffs are advertised as having been fried to perfection. Winter squash is generally advertised as having been cooked.

In *Hughes Extension—Frozen Foods*, 71 M.C.C. 457, decided April 16, 1957, division 1 found that the transportation of frozen french fried potatoes was not within the partial exemption provided by section 203(b)(6) of the act, and that finding was cited with approval in *Midwest Coast Transport, Inc., Extension—Montana*, 74 M.C.C. 1, decided December 31, 1957. We find no proper basis here for a departure from such findings, and nothing in any of the court decisions referred to by petitioners to warrant such a departure. French fried potatoes, as named and distributed by the frozen food industry, are a product far removed from the potato as it is taken from the field. They have become partially impregnated with oil and have undergone substantial textural changes including the expansion of up to 80 percent of the natural starch content. They have acquired a separate and distinct name, character, and use. They are frequently referred to merely as "french fries," without the use of

the word "potato" at all. Certainly, it cannot be said that this product has retained a continuing substantial identity to the potato as harvested through the elaborate processing heretofore described. Compare *East Texas Motor Freight Lines, Inc.*, v. *Frozen Food Exp.*, 351 U.S. 49, wherein the so-called continuing substantial identity test was announced. We conclude that the transportation of frozen french fried potatoes has never been exempt from economic regulation under the provisions of section 203(b)(6) of the act.

The same conclusion is warranted as to any vegetable which has been cooked to the point of a material change in the texture of the raw article or has undergone an infusion of foreign substances such as oil, milk, eggs, margarine, flour, and other materials. The winter squash and candied sweet potatoes, for example, have been cooked to a high degree and the texture of the "flesh" of such items has been substantially altered. In addition a powdered sweetener has been added to the sweet potatoes. Similarly, the potato content in the potato puffs and the whipped potatoes has been adulterated by the introduction of other substances, and a new and different product has emerged. French fried onion rings, covered with batter and fried, have lost their identity as vegetables and have acquired a new name, character, and use. We cannot accept petitioners' contention that the cooked and otherwise altered vegetables and products heretofore described merely have been "processed" for market and continue to maintain their identity as vegetables. They are, in fact, prepared foods and we think that they are embraced within the term "manufactured products" as used in section 203(b)(6) of the act.

As seen, the instant petition seeks a declatory order under the provisions of section 5(d) of the Administrative Procedure Act. Our authority under section 5(d) is discretionary, and we deem a declaratory order in the cir-

cumstances here presented not to be necessary. However, we do have general authority to entertain petitions seeking interpretation of the various provisions of the Interstate Commerce Act, and we shall consider the instant petition as one seeking an interpretation of section 203 (b) (6) as in effect prior to its amendment by the Transportation Act of 1958. Compare *Atlantic Frt. Lines, Inc. —Petition For Declaratory Order*, 51 M.C.C. 175 (185).

We conclude, and so find that the term "agricultural (including horticultural) commodities (not including the manufactured products thereof)" as used in section 203 (b) (6) of the Interstate Commerce Act prior to the amendment thereof by the Transportation Act of 1958, did not include frozen french fried potatoes, frozen rissole potatoes, frozen potato puffs, frozen candied sweet potatoes, frozen whipped potatoes, frozen french fried onion rings, frozen precooked pouch-packed vegetables in general, and frozen precooked pouch-packed vegetables with sauce in particular. We further conclude and find that such term did not include any frozen vegetable which has been cooked in water or steam for a period longer than that necessary for the inactivation of the enzymes; any frozen vegetable which has been cooked by immersion in oil or fat; or any vegetable product the ingredients of which include vegetable matter combined with other commodities.

An order discontinuing the proceeding will be entered.

COMMISSIONER GOFF concurs in the result.

APPENDIX A

List of parties joining in the petition

1. ASSOCIATIONS

*National Association of Frozen Food Packers, Washington, D.C.
*National Fisheries Institute, Inc., New York, N.Y.
*Eastern Freezers Association, Seabrook, N.J.
*Frozen Potato Products Institute, Chicago, Ill.
*New York State Canners & Freezers Association, Inc., Rochester, N.Y.
*Northwest Canners & Freezers Association, Portland, Oreg.
*Tri-State Packers' Association, Inc., Easton, Md.
*National Frozen Food Distributors Association, New York, N.Y.

2. PACKERS

*Cascade Frozen Food, Inc, Burlington, Wash.
*Cedargreen Frozen Pack Corporation, Bellingham, Wash.
*Continental Baking Company, Rye, N.Y.
*Curtice Brothers Co., Rochester, N.Y.
*General Foods Corp., White Plains, N.Y.
*Olney & Carpenter, Inc., Wolcott, N.Y.
*Mrs. Paul's Kitchens, Philadelphia, Pa.
*Pasco Packing Company, Dade City, Fla.
*Pet Milk Company, St. Louis, Mo.
*Seabrook Farms Co., Seabrook, N.J.
*Shoreland Freezers, Inc., Salisbury, Md.
*J. R. Simplot Company, Boise, Idaho.
*Snow Flake Canning Company, Brunswick, Maine.
*Stokley-Van Camp, Inc., Oakland, Calif.
*The Winter Garden Company, Knoxville, Tenn.
Ore-Ida Potato Products, Inc., Ontario, Oreg.
The Snake River Trout Company, Buhl, Idaho.
Southland Frozen Foods, Inc., New York, N.Y.
The Winter Garden Freezer Co., Inc., Bells, Tenn.

* Parties joining in petition as initially filed.

3. CARRIERS

*Bonney Motor Express, Inc., Norfolk, Va.
*Brady Motorfrate Terminals, Des Moines, Iowa.
*The Emery Transportation Company, Chicago, Ill.
*Federal Trucking Company, Federalsburg, Md.
*Direct Transports, Inc., Fort Dodge, Iowa.
*Hale Distributing Co., Inc., Los Angeles, Calif.
*J. E. Jarman, Berlin, Md.
*Lake Refrigerated Service, North Bergin, N.J.
*Riggs Dairy Express, Inc., Versailles, Ohio.
*S & S Transportation, Inc., Wolcott, N.Y.
*V. J. Tovatt Co., Lynwood, Calif.
*Watson Bros. Transportation Co., Inc., Omaha, Nebr.
*Worster Motor Lines, Inc., North East, Pa.
J. M. Blythe Motor Lines, Sanford, Fla.
Colonial Refrigerated Transportation, Inc., Birmingham, Ala.
Frozen Food Express, Dallas, Tex.
Kroblin Refrigerated Express, Sumner, Iowa.
Lester C. Newton Trucking Company, Bridgeville, Del.
Mushroom Transportation Co., Inc., Philadelphia, Pa.
Pacific Intermountain Express Co.

APPENDIX B

Parties opposing petitioners

Association of American Railroads.
Rail carriers in trunkline, central, western district, and southern territories.
Bangor and Aroostock Railroad Company.
Maine Central Railroad Company.
Boston and Maine Railroad.
New York, New Haven and Hartford Railroad Company.
The Regular Common Carrier Conference of the American Trucking Associations, Inc.
The Common Carrier Conference, Irregular Route, of the American Trucking Associations, Inc.
Service Trucking Company, Inc.
Refrigerated Food Express, Inc.

* Parties joining in petition as initially filed.

Cargo-Imperial Freight Lines, Inc.
St. Johnsbury Trucking Co., Inc.
Rapid Transit Co., Inc.
Old Colony Transportation Co.
Merchants Service Trucking, Inc.
Henry Jenkins Transportation Co., Inc.
Inland Express, Inc.
Hunnewell Trucking, Inc.
M & M Transportation Company.
Cole's Express.
Boston & Taunton Transportation Company.
The Adley Express Company.
Benjamin Motor Express, Inc.
Border Express, Inc.
Hemmingway Brothers Transportation Company.

APPENDIX "C"

STATUTES INVOLVED

Interstate Commerce Act, Part II, Act of February 4, 1887, ch. 104, as amended August 9, 1935, ch. 498, 49 Stat. 543, and September 18, 1940, ch. 722, title I, § 15, 54 Stat. 919; 49 U.S.C. § 301 *et seq.*

Section 203 (b) (6), as enacted August 9, 1935, ch. 498, 49 Stat. 544, and amended June 29, 1938, ch. 811, §§ 2, 3, 52 Stat. 1237, September 18, 1940, ch. 722, title I, §§ 16, 18, 54 Stat. 921, and July 9, 1952, ch. 599, 66 Stat. 479:

> Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * * motor vehicles used in carrying property consisting of ordinary livestock, fish (including shellfish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation; * * *

Section 7, Transportation Act of 1958, Public Law 85-625, 85th Cong., 2nd Sess., August 12, 1958, 72 Stat. 573:

> (a) Clause (6) of subsection (b) of section 203 of the Interstate Commerce Act, as amended, is amended by striking out the semicolon at the end thereof and inserting in lieu thereof a colon and the following: "*Provided*, That the words 'property, consisting of ordinary livestock, fish (including shellfish), or agricultural (including horticultural) commodities (not including manufactured products thereof)' as used herein shall include property shown as 'Exempt' in the 'Commodity List' incorporated in ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, but shall not include property shown therein as 'Not exempt';

Provided further, however, That notwithstanding the preceding proviso the words 'property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)' shall not be deemed to include frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, and wool imported from any foreign country, wool tops and noils, or wool waste (carded, spun, woven, or knitted), and shall be deemed to include cooked or uncooked (including breaded) fish or shell fish when frozen or fresh (but not including fish and shell fish which have been treated for preserving, such as canned, smoked, pickled, spiced, corned or kippered products)".

(b) Unless otherwise specifically indicated therein, the holder of any certificate or permit heretofore issued by the Interstate Commerce Commission, or hereafter so issued pursuant to an application filed on or before the date on which this section takes effect, authorizing the holder thereof to engage as a common or contract carrier by motor vehicle in the transportation in interstate or foreign commerce of property made subject to the provisions of part II of the Interstate Commerce Act by paragraph (a) of this section, over any route or routes or within any territory, may without making application under that Act engage, to the same extent and subject to the same terms, conditions and limitations, as a common or contract carrier by motor vehicle, as the case may be, in the transportation of such property, over such route or routes or within such territory, in interstate or foreign commerce.

(c) Subject to the provisions of section 210 of the Interstate Commerce Act, if any person (or its predecessor in interest) was in bona fide operation on May 1, 1958, over any route or routes or within any territory, in the transportation of property for compensation by motor vehicle made subject to the provisions of part II of that Act by paragraph (a) of this section, in interstate or foreign commerce, and has so operated since that time (or if engaged in furnishing seasonal service only, was in bona fide

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JOHN F. DAVIS, CLERK

No. 768

In the Supreme Court of the United States

OCTOBER TERM, 1962

LESTER C. NEWTON TRUCKING COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

On Appeal from the United States District Court for the District of Delaware

MOTION TO AFFIRM

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February 1963

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MOTION TO AFFIRM

Appellees,[1] pursuant to Rule 16, paragraph 1(c) of the Revised Rules of the Supreme Court of the United States,

[1]The appellees filing this Motion to Affirm are: Regular Common Carrier Conference of the American Trucking Associations, Inc.; Association of American Railroads; Class I Railroads in Southern Territory; Bangor & Aroostook Railroad Company, Maine Central Railroad Company, Boston & Maine Railroad, and New York, New Haven & Hartford Railroad Company; Class I Rail Carriers in Western District; New York Central Railroad Company, Baltimore & Ohio Railroad Company, Pennsylvania Railroad Company, Lehigh Valley Railroad Company, Chesapeake and Ohio Railway Company, and Erie-Lackawanna Railroad Company. These appellees were parties to the proceeding before the Interstate Commerce Commission and were intervening defendants in the case before the district court.

move that the judgment of the district court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from the final judgment and decree entered on October 15, 1962, by a district court of three judges specially constituted pursuant to 28 U.S.C. § 2284, dismissing appellants' complaint which sought to set aside orders of the Interstate Commerce Commission.[2]

On February 5, 1959, the National Association of Frozen Food Packers and other parties filed a petition with the Interstate Commerce Commission for the issuance of a declaratory order that the transportation of "frozen cooked vegetables, such as french fried potatoes" were exempt from regulation by the Commission prior to the Transportation Act of 1958.[3] The petitioners were attempting to establish by such a declaratory order (1) that frozen cooked vegetables were exempt from regulation by the Commission prior to the Transportation Act of 1958, (2) that frozen cooked vegetables were made subject to regulation by Section 7(a) of that act,[4] and (3) that motor carriers who transported frozen cooked vegetables on and after May 1, 1958, [apparently on the belief that such commodities were exempt from regulation] were entitled to "grandfather" rights under Section 7(c) of that act without proving public convenience and necessity.

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[2] The final judgment is not printed in appellants' Jurisdictional Statement. The opinion of the district court is attached to appellants' Jurisdictional Statement as Appendix A.

[3] Transportation Act of 1958, Public Law 85-625, 72 Stat. 573.

[4] Section 7 of the Transportation Act of 1958 amended Section 203(b)(6) of the Interstate Commerce Act, 49 U.S.C. 303(b)(6).

Following hearings, Division 1 of the Commission on September 28, 1959, issued a unanimous report and order, in which it made the necessary findings and concluded that the considered frozen cooked vegetables were subject to regulation prior to the Transportation Act of 1958 (J.S. 41). A petition for reconsideration of this order was filed by the appellants, but it was denied by the entire Commission on August 3, 1961.

Appellants brought this action in the United States District Court for the District of Delaware for the purpose of having the report and order of September 28, 1959, and the order of August 3, 1961, set aside, and for the further purpose of having the district court enter a decree declaring that frozen cooked vegetables were exempt from regulation prior to the Transportation Act of 1958 and that the transportation by motor vehicle of such vegetables was made subject to regulation by that act. In a unanimous decision the district court dismissed the complaint on the grounds that the Commission's report and orders were in accord with the statutes and were not unreasonable (J.S. 28 and 30). The district court further concluded that frozen cooked

The report of the Commission is attached to the appellants' Jurisdictional Statement as Appendix B. The order of the Commissioners is not printed in appellants' Jurisdictional Statement but it is a part of the record which was transmitted to this Court.

"The following vegetables were specifically mentioned by name in the Commission's findings and conclusions because they are the only ones on which the appellants introduced evidence at the hearing: frozen french fried potatoes, frozen rissole potatoes, frozen potato puffs, frozen canned sweet potatoes, frozen whipped potatoes, frozen french fried onion rings, frozen precooked ponch-packed vegetables, in general, and frozen precooked ponch-packed vegetables with sauce, in particular (J.S. 30 and 41).

This order of the Commission is not printed in appellants' Jurisdictional Statement but it is a part of the record which was transmitted to this Court.

vegetables were not made subject to regulation by the Transportation Act of 1958 and, therefore, the transportation of such commodities is not within the purview of the "grandfather" rights conferred by Section 7(c) of that act (J.S. 27-28).

ARGUMENT

The decision of the district court is plainly correct and is in accord with the decisions of other district courts on virtually the same question, including one, the *Milk Transport* case, which was recently affirmed by this court: *Midwest Emery Freight System, Inc. v. United States*, 202 F. Supp. 229 (N.D. Ill. 1961); *Milk Transport, Inc. v. Interstate Commerce Commission*, 190 F. Supp. 350 (D. Minn. 1960), *aff'd sub nom. Milk Transport, Inc. v. United States*, 368 U.S. 5 (1961).

The ultimate question presented in this case is whether motor carriers which transported frozen cooked vegetables on and after May 1, 1958, are entitled to "grandfather" rights under Section 7(c) of the Transportation Act of 1958. Since Section 7 of that act created the "grandfather" rights, the answer to this question must be found in the meaning of that section.

Section 7(c) of the Transportation Act of 1958 (commonly referred to as the "grandfather clause") provides that the Interstate Commerce Commission shall "without proof of public convenience and necessity issue a certificate of permit to motor carriers which were transporting on and after May 1, 1958, property made subject to the provisions of part II of that Act [Interstate Commerce Act] by paragraph (a) of this section" (J.S. 4).

With respect to what property was made subject to regul-

lation by paragraph (a) of Section 7, that paragraph provides in pertinent part as follows:

> "(a) . . . *Provided*, That the words . . . 'agricultural . . . commodities (not including manufactured products thereof)' as used herein shall include property shown as 'Exempt' in the Commodity List incorporated in the ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, but shall not include property shown therein as 'Not exempt': *Provided further, however*, That notwithstanding the preceding proviso the words . . . 'agricultural . . . commodities (not including manufactured products thereof)' shall not be deemed to include . . . 'frozen vegetables . . .'" (J.S. 45-46)

It is apparent from the above that Congress adopted the exempt and not exempt status of commodities as listed in Ruling 107, except as to the eleven commodities, one of which was frozen vegetables, named in the second proviso of paragraph (a) of that section. As to those eleven commodities, Congress refused to adopt their previous classification as exempt and, instead, specifically declared that henceforth their transportation would be subject to regulation. The only commodities, therefore, which were "made subject to regulation" by paragraph (a) are the ones listed as exempt in Ruling 107 which then had their status changed to not exempt by being included in the eleven commodities specifically named in the second proviso of that paragraph. For example, cocoa beans and tea were listed in Ruling 107 as exempt, but they were made subject to regulation by being included among the eleven commodities specifically named in the second proviso of paragraph (a). Citrus juices and crude rubber were listed in Ruling 107 as not exempt and the courts below held that they were not made subject to

regulation by that paragraph. *Midwest Emery Freight System, Inc. v. United States*,[8] *Milk Transport, Inc. v. Interstate Commerce Commission*.[9]

The portions of Ruling 107 applicable to this case are:[10]

> "Vegetables
>
> Candied sweet potatoes, frozen—Not exempt—Case 7,[11] Note 6.
>
> Cooked—Not exempt—Bureau opinion.
>
> French fried potatoes—Not exempt—Case 10.[12]
> Frozen, fresh—Exempt—Case 21.[13]"

As may be seen by the above, two of the cooked vegetables involved in this case, french fried potatoes and frozen candied sweet potatoes, were specifically listed as not exempt in Ruling 107 and clearly come within the holding of the *Milk Transport* case that commodities so listed were not made subject to regulation by paragraph (a).

With respect to the other cooked vegetables involved in this case, the district court followed the ruling of the *Milk*

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[8] 202 F. Supp. 229 (N.D. Ill. 1961).

[9] 190 F. Supp. 350 (D. Minn. 1960), *aff'd sub nom. Milk Transport, Inc. v. United States*, 368 U.S. 5 (1961).

[10] The section of Ruling 107 which pertains to "Vegetables" is set out in full on pages 2 and 3 of the "Petition of the National Association of Frozen Food Packers, et al. for a Declatory Order," dated February 5, 1959. That petition was a part of the record which was transmitted to this Court.

[11] *Hughes Extension—Frozen Foods*, 71 M.C.C. 457 (1957).

[12] *Midwest Coast Transport, Inc. Extension—Montana*, 71 M.C.C. 1 (1957).

[13] *Home Trucking & Storage Co. v. United States*, 141 F. Supp. 500 (W.D. Wash. 1956), *aff'd sub nom. Interstate Commerce Commission v. Home Trucking & Storage Co., Inc.*, 352 U.S. 881 (1956).

Transport case and held that since cooked vegetables were listed as not exempt in Ruling 107, they were not made subject to regulation by paragraph (a) (1) (S. 27).

Since it was necessary to establish a line of demarcation between frozen fresh vegetables and cooked vegetables, the Commission in its report of September 28, 1959, concluded that "any frozen vegetables which have been cooked in water or steam for a period longer than that necessary for the inactivation of the enzymes" are cooked vegetables (J.S. 41). On this point the district court presented an exceptionally lucid analysis of the basis for, and necessity of, the Commission's use of the "inactivation of the enzymes" criterion:

> "Ruling 107 of the Inter-state Commerce Commission, specifically adopted by Congress, provides that cooked vegetables are not exempt and were not exempt prior to the Amendment of 1958. Ruling 107 also provides that 'vegetables, frozen, fresh' were exempt under the Home Transfer & Storage case.
>
> "These provisions are of equal weight and validity and both must receive full recognition by this Court. It is clear that some construction must be adopted to harmonize and give effect to both provisions. The authoritative ruling that held that frozen vegetables were exempt was the Home Transfer case. That case, however, held that the vegetables there concerned [illegible] handling to the point of inactivation of the enzyme, and then frozen, remained essentially in the same state and [illegible] unprocessed vegetables. In effect the Commission, setting blanching merely to the point of destroying the enzymes and then freezing, did not change their characteristics as fresh vegetables. Thus the [illegible] of demarcation and [illegible] the statute [illegible] the district court [illegible]

destroys the exemption provided by Congress is contrary to the express language of the Home Transfer case, as affirmed by the Supreme Court. A determination that unrestricted cooking followed by freezing creates an exemption is directly contrary to the conclusion reached by the Interstate Commerce Commission as indicated in the Ruling 107 and expressly adopted by Congress, which said that 'cooked vegetables' were not exempt.

. . . The Commission has adopted the view of the Supreme Court that cooking vegetables to the point of inactivation of the enzymes and then freezing them leaves such vegetables as frozen fresh vegetables and exempt from regulation. The Commission has concluded that cooking vegetables beyond the point indicated and then freezing them makes them fall within the classification of 'cooked vegetables' which Congress has said are not exempt.

"We cannot say that the construction put upon the Statute by the Commission is unreasonable. Indeed, it would be difficult to phrase a different result without 'doing violence to the indicated intention of Congress.'" (J.S. 27-28)

Appellants also contend that if this Court affirms the district court's judgment, it would cause the motor carrier appellants' service to be atomized or fragmentized. (J.S. 10-12). The district court correctly answered this contention when it tersely stated that "such a result is caused by the Act of Congress itself and the remedy must there be sought." (J.S. 28). The Interstate Commerce Commission is the public body charged with the maintenance of efficient and economical transportation in the United States, and if, as appellants complain, service to the public would be disrupted, then any operating rights required to give the public adequate service may be obtained by filing an application

for such rights with that Commission in accordance with the usual statutory procedure.[14]

The meanings of Section 203(b)(6) (the agricultural exemption clause) of the Interstate Commerce Act and Section 7 (the "grandfather" clause) of the Transportation Act of 1958 have been litigated on numerous occasions.[15] The unanimous report and orders of the Commission and the unanimous decision of the district court sustaining those orders are well reasoned and are in accordance with all prior court decisions on these subjects. In fact, the specific question presented in this case, the interpretation of Section 7 of the Transportation Act of 1958, was recently before this Court in the *Milk Transport* case. Appellees respectfully submit that the question presented in the instant case comes within the holding of the *Milk Transport* case and that fur-

[14] In this regard the appellants stated in footnote 17 of the Jurisdictional Statement that approximately 500 motor carriers are transporting frozen vegetables pursuant to the "grandfather" rights created by Section 7(c) of the Transportation Act of 1958. It should be noted that only twelve motor carriers appear as appellants in this case. The substantial majority of the approximately 500 motor carriers transporting frozen fresh vegetables pursuant to "grandfather" rights are represented by one of the appellees, the Regular Common Carrier Conference of the American Trucking Associations, Inc., which supports the decisions of the Commission and the district court.

[15] *Midwest Emery Freight System, Inc. v. United States*, 202 F. Supp. 220 (N.D. Ill. 1961); *Milk Transport, Inc. v. Interstate Commerce Commission*, 190 F. Supp. 350 (D. Minn. 1960), *aff'd sub nom. Milk Transport, Inc. v. United States*, 368 U.S. 5 (1961); *Hunter & Storage Co. v. United States*, 141 F. Supp. 500 (W.D. Wash. 1956), *aff'd sub nom. Interstate Commerce Commission v. Hunter Transfer & Storage Co., Inc.*, 352 U.S. 884 (1956); *Jackson Fruit Express v. United States*, 128 F. Supp. 37 (D. Nev. 1955), *aff'd per curiam*, 351 U.S. 40 (1956), *aff'd in part sub nom. Interstate Motor Freight Lines, Inc. v. Denver Food Terminal*, 351 U.S. 44 (1956), *further consideration*, 148 F. Supp. 880 (D. Nev. 1956), *aff'd sub nom. Interstate Commerce Commission v. Jackson Fruit Express*, 355 U.S. 6 (1957).

ther review of this subject is unnecessary and would serve no useful purpose.

CONCLUSION

The appeal presents no substantial question warranting further review, and the judgment of the district court should be affirmed.

Respectfully submitted.

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February 1963

PROOF OF SERVICE

I, T. Randolph Buck, Attorney for the Appellees and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of February, 1963, I served copies of the foregoing Motion to Affirm on the several parties by mailing copies thereof, in duly addressed envelopes, with postage prepaid, as follows:

1. On the Appellee, United States of America, copies to The Honorable Robert F. Kennedy, The Attorney General of the United States, Department of Justice, Washington 25, D. C., The Honorable Archibald Cox, Solicitor General, Department of Justice, Washington 25, D. C., and The Honorable Lee Loevinger, Assistant Attorney General, Department of Justice, Washington 25, D. C.

2. On the Appellee, Interstate Commerce Commission, copies to The Honorable Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C., and The Honorable Fritz R. Kahn, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

3. On the Appellants, Lester C. Newton Trucking Company, Watkins Motor Lines, Inc., Colonial Refrigerated Transportation, Inc., Cole Hedin Trucking Lines, Inc., Warren P. Kurtz, d/b/a Lake Refrigerated Service, Langdon Truck Lines, Inc., Peter Hollebrand, Eastman Gillerson & Company, Ralph E. Dunkley, d/b/a Dunkley Distributing Company, T. Edward Lamaire, Hale Distributing Co., Inc., Seabrook Farms Co., Division, H. Leeper & Company, Mrs. Paul's Kitchens, Division of T. J. McAfee & Co., Inc., Dulany Foods, Inc., Southland Frozen Foods, Inc., Ark-Homa Farms Frozen Foods, Inc., The Snake River Trout Company, Ashdown, Inc., Boral Seafoods, Inc.,

and The Winter Garden Freezer Co., Inc., copies to their attorneys, H. Charles Ephraim, Esq., 1001 Fifteenth Street, N. W., Washington 5, D. C., William J. Augello, Jr., Esq., 2 West Forty-fifth Street, New York 36, New York, and H. James Conaway, Jr., Esq., 1401 Bank of Delaware Building, Wilmington, Delaware.

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No. 708

In the Supreme Court of the United States

OCTOBER TERM, 1962

LESTER C. NEWTON TRUCKING COMPANY, ET AL.,
APPELLANTS
v.
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND ASSOCIATION OF AMERICAN RAILROADS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

MOTION TO AFFIRM

[redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 768

LESTER C. NEWTON TRUCKING COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND ASSOCIATION OF AMERICAN RAILROADS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court dismissing appellants' complaint seeking to set aside orders of the Interstate Commerce Commission. The Commission orders determined that appellants' carriage of certain frozen cooked vegetables was not exempt from Section 203(b)(6) of the Interstate Commerce Act, prior to its

amendment by the Transportation Act of 1958, as the carriage of "agricultural (including horticultural) commodities (not including the manufactured products thereof)."

The statutory background.—The Motor Carrier Act of 1935, 49 Stat. 543, 49 U.S.C. 301, *et seq.*, subjected many aspects of interstate motor carriage to regulation by the Interstate Commerce Commission. Section 203(b)(6), 49 U.S.C. 303(b)(6), however, provided an exemption for "motor vehicles used in carrying property consisting of * * * agricultural commodities (not including manufactured products thereof) * * *." The great expansion of intercity trucking and the rapid development of new food marketing techniques following World War II gave rise to conflicts as to what articles came within the scope of the exemption, and a number of items which had been held nonexempt by the Commission were found upon judicial review to be exempt.[1] In *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express*, 354 U.S. 49, 54, this Court held that frozen poultry was an exempt agricultural commodity and set down the following standard: "[W]here the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been 'manufactured' within the meaning of § 203

[1] *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express*, 351 U.S. 49; *Frozen Food Express* v. *United States*, 148 F. Supp. 399, 401 (S.D. Tex.), affirmed *sub nom. Akron, C. & Y. R. Co.* v. *Frozen Food Express*, 355 U.S. 6; *Premier Peat Moss Corp.* v. *United States*, 147 F. Supp. 169 (S.D. N.Y.), affirmed, 355 U.S. 13; *Consolidated Truck Service, Inc.* v. *United States*, 144 F. Supp. 814 (D. N.J.).

(b)(6)." In a subsequent application of this criterion, frozen fresh vegetables which had first been blanched or parboiled to kill enzymatic action prior to the freezing process were held to be unmanufactured and hence exempt in *Home Transfer & Storage Co. v. United States*, 141 F. Supp. 599 (W.D. Wash.), affirmed, *per curiam, sub nom. Interstate Commerce Commission v. Home Transfer & Storage Co.*, 352 U.S. 884.

In response to widespread sentiment that the agricultural commodities exemption be clarified,[2] Congress amended Section 203(b)(6) by Section 7 of the Transportation Act of 1958, 72 Stat. 573 (see J.S. 45–47). Section 7(a) added two provisos to Section 203(b)(6):

> *Provided*, That the words "property consisting of * * * agricultural (including horticultural) commodities (not including manufactured products thereof)" as used herein shall include property shown as "Exempt" in the "Commodity List" incorporated in ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, but shall not include property shown therein as "Not exempt": *Provided further, however*, That notwithstanding the preceding proviso the words 'property consisting of * * * agricultural (in-

[2] See Hearings on the Problems of the Railroads Before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess. (1958); Hearings on H.R. 3823 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess. (1958); Interstate Commerce Commission, Seventy First Annual Report 138–139 (1957).

cluding horticultural) commodities (not including manufactured products thereof)' shall not be deemed to include * * * frozen vegetables [and ten other named commodities].

Administrative Ruling 107, incorporated into the Act by the first proviso, was a list indicating the exempt or nonexempt status of various agricultural commodities as determined by the courts or the Commission. For example, in accord with the decision in the *Home Transfer & Storage* case, *supra*, frozen fresh vegetables were listed as exempt. Frozen candied sweet potatoes and french fried potatoes were shown as nonexempt on the basis, respectively, of *Hughes Extension—Frozen Foods*, 71 M.C.C. 457, and *Midwest Coast Transport, Inc., Extension—Montana*, 74 M.C.C. 1. The ruling also indicated the opinion of the Bureau of Motor Carriers concerning the status of various additional items. Thus, cooked vegetables were listed as nonexempt. By incorporating Ruling 107 Congress gave statutory recognition to hundreds of designations of the exempt or nonexempt status of commodities.

In addition, Congress returned to regulation "frozen vegetables" and the ten other enumerated items. See H. Rep. No. 2274, 85th Cong., 2d Sess., p. 15; S. Rep. No. 1647, 85th Cong., 2d Sess., p. 4; H. Rep. No. 1922, 85th Cong., 2d Sess., pp. 16–17. With regard to the commodities which the Act returned to regulation, Congress provided for "grandfather" rights. Section 7(c) of the 1958 Act states than "any person * * * in bona fide operation on May 1, 1958 * * * in the transportation of property for compensation by motor vehicle made subject to the

provisions of part II of that Act by paragraph (a) of this section * * *" would be entitled to a permit or certificate without a hearing to consider public convenience and necessity.

The facts of this case.—Appellants petitioned the Commission for a declaratory order under Section 5(d) of the Administrative Procedure Act, 5 U.S.C. 1004(d), to declare that frozen french fried potatoes and certain other frozen cooked vegetables were exempt prior to the 1958 Act and therefore that they were entitled to "grandfather" rights. Division 1 of the Commission determined that they were not exempt. On August 3, 1961, the entire Commission denied the petition for reconsideration. The appellants then sought injunctive relief in the district court against the enforcement of the Commission's order. The court held that the Commission applied a proper criterion in determining the status of the commodities

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[1] The Commission's conclusion was as follows (J.S. 41): "We conclude, and so find that the term 'agricultural (including horticultural) commodities (not including the manufactured products thereof)' as used in section 203(b)(6) of the Interstate Commerce Act prior to the amendment thereof by the Transportation Act of 1958, did not include frozen french fried potatoes, frozen rissole potatoes, frozen potato puffs, frozen candied sweet potatoes, frozen whipped potatoes, frozen french fried onion rings, frozen precooked pouch-packed vegetables in general, and frozen precooked pouch-packed vegetables with sauce in particular. We further conclude and find that such term did not include any frozen vegetable which has been cooked in water or steam for a period longer than that necessary for the inactivation of the enzymes; any frozen vegetable which has been cooked by immersion in oil or fat; or any vegetable product the ingredients of which include vegetable matter combined with other commodities."

prior to 1958 (J.S. 29) and that the result reached by the Commission was in accord with Section 7 of the 1958 Act (J.S. 23–28).[4]

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court. It is undisputed that carriage of the frozen cooked foods involved in this case is now regulated under the Motor Carrier Act. If this carriage was first made subject to regulation by the Transportation Act of 1958, appellant carriers would be entitled to "grandfather" rights; if, on the other hand, the carriage was not exempt from regulation prior to the 1958 Act as "agricultural * * * commodities (not including manufactured products thereof)," appellants are not entitled to "grandfather" rights. The Commission found that the carriage was not exempt before the 1958 amendment was passed. We submit that its construction of the agricultural commodity exemption was a valid exercise of administrative expertise, which was properly sustained below.

1. The Commission correctly ruled that the frozen cooked vegetables processed or transported by appellants were not exempt prior to the 1958 amendment.

a. Contrary to appellants' contention (J.S. 15), the Commission applied the "continuing substantial identity" test enunciated by this Court in *East*

[4] While the district court upheld the Commission's ruling with respect to the specified frozen vegetables and the enzyme inactivation test, it ruled that the last two tests in the passage quoted in note 3, *supra*, were not ripe for review in this case (J.S. 29–30).

Texas Motor Freight Lines, Inc. v. *Frozen Food Express*, 351 U.S. 49. The Commission set out in detail the processes by which the various vegetables are made into the frozen products at issue (J.S. 36-39). Most of the technical evidence concerned french fried potatoes, and the Commission concluded (J.S. 39-40):

> French fried potatoes, as named and distributed by the frozen food industry, are a product far removed from the potato as it is taken from the field. They have become partially impregnated with oil and have undergone substantial textural changes including the expansion of up to 80 percent of the natural starch content. They have acquired a separate and distinct name, character, and use. They are frequently referred to merely as "french fries," without the use of the word "potato" at all. Certainly, it cannot be said that this product has retained a continuing substantial identity to the potato as harvested through the elaborate processing heretofore described. Compare *East Texas Motor Freight Lines, Inc.*, v. *Frozen Food Exp.*, 351 U.S. 49, wherein the so-called continuing substantial identity test was announced. We conclude that the transportation of frozen french fried potatoes has never been exempt from economic regulation under the provisions of section 203(b)(6) of the act.

The Commission also applied the same standard to the other products, stating (J.S. 40):

> We cannot accept petitioners' contention that the cooked and otherwise altered vegetables and products heretofore described merely have been "processed" for market and continue to main-

tain their identity as vegetables. They are, in fact, prepared foods and we think that they are embraced within the term "manufactured products" as used in section 203(b)(6) of the act.

b. Appellants object (J.S. 12–15) to the use of the enzyme inactivation test by the Commission. In *Home Transfer & Storage Co.* v. *United States*, 141 F. Supp. 599 (W.D. Wash.), affirmed, *per curiam*, *sub nom. Interstate Commerce Commission* v. *Home Transfer & Storage Co.*, 352 U.S. 884, it was held that frozen vegetables that had only been parboiled or blanched, but not cooked beyond the enzyme inactivation point, were exempt agricultural commodities (J.S. 41). Such parboiling is necessary to make it possible to preserve vegetables by the freezing process (J.S. 35). In this process, the vegetables are kept as close to being fresh vegetables without the risk of spoilage as is technologically possible. In contrast, further cooking before freezing will "effect a substantial change in the texture of the vegetable as it comes from the field" and is intended to do so (J.S. 39). Thus, the enzyme inactivation test helps to ascertain whether, under the test laid down in the *East Texas Motor* case, frozen vegetables retain their substantial identity through the processing stage and are therefore still agricultural commodities or lose their identity and are manufactured.

All the products here involved were cooked beyond the point necessary for the inactivation of enzymes to the stage of making a substantial change in their texture (J.S. 29, 41). Most of them underwent additional processing—for example, by slicing, mashing, extrud-

ing, immersion in oil, frying in batter, adding sauces and garnishes—to produce what the Commission correctly called "prepared foods" (J.S. 40). They are therefore "manufactured products" excluded from the agricultural commodity exemption.

2. Even if the carriage of the frozen cooked vegetables involved in this case had been exempt prior to the 1958 Act, no "grandfather" rights would have been conferred by that Act. Congress could, and did, give limited grandfather rights only for those specific commodities whose previously exempt status was rescinded by the second proviso of Section 7(a). *Milk Transport, Inc., v. Interstate Commerce Commission*, 190 F. Supp. 350, 352–353 (D. Minn.), affirmed, 368 U.S. 5. The first proviso added by Section 7(a) of the 1958 Act conferred a statutory status upon Commission Ruling 107 and thereby determined that various commodities, including those here involved, would continue to be "not exempt,"[5] even though they might otherwise have escaped regulation through future litigation. Congress did not consider such commodities as thereby returned to regulation for the purpose of grandfather rights. Instead, Congress adopted Ruling 107 as a device for specifying exempt and nonexempt agricultural commodities and for designating those nonexempt commodities which were to be covered by grandfather rights. *Milk*

[5] Some of the commodities were specifically nonexempt under Ruling 107. As to the others, the district court found they were "cooked vegetables" which Ruling 107 declared to be nonexempt (J.S. 27, 28). The district court, in making this determination, applied the enzyme inactivation test which is discussed above (pp. 8–9).

Transport, Inc. v. Interstate Commerce Commission, *supra*, 190 F. Supp at 353.

3. Appellants seek to rely (J.S. 13–15) upon the second proviso added by the Transportation Act of 1958, listing "frozen vegetables" among the eleven specific items expressly made subject to regulation. They contend that all frozen vegetables were intended to be covered by the grandfather rights, even if they had not been exempt before 1958.

Appellants' contention is in conflict with the language of Section 7(c). That Section provides for grandfather rights only for commodities "made subject to" regulation by Section 7(a); *supra*, p. 4. *Milk Transport, Inc. v. Interstate Commerce Commission*, *supra*. Since the frozen vegetables involved here were already subject to the Act prior to the enactment of Section 7(a), no grandfather rights were conferred.[6]

This construction of the clear language of the statute is confirmed by the congressional purpose in enacting the 1958 Act. Because of the adverse impact upon regulated carriers, Congress decided to halt any further expansion of the agricultural commodity exemption. Congress was seeking to limit the exemp-

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[6] See H. Rep. No. 2274, 85th Cong., 2d Sess., p. 15; S. Rep. No. 1647, 85th Cong., 2d Sess., p. 4; H. Rep. No. 1922, 85th Cong., 2d Sess., p. 17; 104 Cong. Rec. 12532, 15528, 15646; Hearings on the Problems of the Railroads Before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., p. 2216; Hearings on H.R. 5823 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., pp. 159–160, 169, 183, 189.

tion, not expand it. See H. Rep. No. 2274, 85th Cong., 2d Sess., p. 15; S. Rep. No. 1647, 85th Cong., 2d Sess., p. 4; H. Rep. No. 1922, 85th Cong., 2d Sess., pp. 16–17. Consequently, the mere fact that a commodity falls within the generic meaning of one of the eleven items listed in the second proviso is not enough to qualify it for grandfather rights unless it had been nonexempt prior to the 1958 Act and was thereby being returned to regulation. It would have been anomalous to provide a prescriptive or "grandfather" right if there had been no initial right of exemption which was terminated.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be affirmed.

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No. 768

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

LESTER C. NEWTON TRUCKING COMPANY, ET. AL.,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and ASSOCIATION OF AMERICAN RAILROADS, ET. AL.,
Appellees.

On Appeal from the United States District Court for the District of Delaware

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APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

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IN THE

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OCTOBER TERM, 1962

No. 768

LESTER G. NEWTON, TRUCKING COMPANY, ET. AL.,
Appellants,

v.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION and ASSOCIATION OF AMERICAN RAILROADS, ET. AL.,
Appellees.

On Appeal from the United States District Court for the District of Delaware

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

Pursuant to Rule 16, Paragraph 3, of the Revised Rules of this Court, Appellants respectfully submit their Brief in opposition to the Motions to Affirm filed: (a) jointly in behalf of the United States of America and the Interstate Commerce Commission, herein "The Government's Motion" or "G.M."; and (b) jointly in behalf of Appellee railroad and motor carrier companies and associations, herein "the Rail Motion" or "R.M." By Order of Mr. Justice Brennan, dated March 3, 1963, the date for filing this Reply was postponed at Appellants' request to March 25, 1963.

THE QUESTION INVOLVED IS SUBSTANTIAL

The question here involved is whether motor carriers transporting "frozen vegetables" under Section 7 of the Transportation Act of 1958 may only transport those vegetables cooked to, but not beyond, the point necessary to inactivate enzymes. It is that test upon which the District Court and the Commission would make such rights depend. This issue is novel and of great importance to motor carriers and processors of frozen vegetables. Appellees do not show that the issue is insubstantial or governed by past decisions of this Court.

The Rail Motor [illegible] that the substantial majority of the 500 "grandfather" motor carrier [illegible] for Appellees, the Regular Common Carrier Conference of the American Trucking Associations, Inc., which supports the decisions below. Appellants [illegible]. No doubt these are carriers whose interest in protecting their certificated operations outweighs their interest in preserving their "grandfather" rights, but there is no evidence that they constitute a majority of these protesting "grandfather" applicants. In the proceedings before The Commission, 19 packers, 20 motor carriers and 8 packer associations supported the petition. J.S. 2-3. One of Appellee Conference's largest members, Pacific Intermountain Express Co., J.S. 34-35, [illegible] introduced evidence. Exh. 1; Tr. 249-62) to support the position now taken by Appellants. Further, since the filing of the appeal herein, Appellants have been advised of personal concern for adverse effects from the decisions below, by 20 motor carriers and processors, as follows: Thompson Central County Canning Corporation, Consumers Packing Company, Dreyer's Frozen Products, Inc., Idaho Potato Growers, Inc., Idaho Potato Processors, Inc., Lamb-Weston, Inc., Ore-Ida Foods, Inc., J. R. Simplot Company, Shoreland Freezers, Inc., Southern Frozen Foods, Inc., Stilwell Frozen Foods, Inc., and Tropic Frozen Foods Corp. (motor carriers), Bellevy Transport Bonanza, Inc., Brown & Old Company, H. C. Duffy Produce, Frigid Food Express, Inc., Jenkins Truck Line, Krublin Refrigerated Xpress, Inc., Northern Fisheries Transportation, R & S Brokerage Co., Red Trucking Co., Refrigerated Trailers, Inc., Refrigerated Truck Lines, Sackville Mills Co., Skagit Valley Trucking Co., Inc., Transamerican Freight Lines, Inc., Willis Shaw Frozen Express, Inc., and Yoder Transfer Company.

1. Appellees do not question the validity of Appellants' claim (J.S., 10-12) that depriving "grandfather" motor carriers of the right to transport frozen vegetables cooked beyond the enzyme inactivation point will destroy their service and vitally affect processors served by them. The Rail Motion (18-9) suggests that such results are immaterial, quoting from the District Court's opinion which (J.S., 28) considered them to be "caused by the Act of Congress itself . . . ." It is difficult to believe that such results are either immaterial or caused by a statute designed to permit continued service by "grandfather" motor carriers without hindering or hampering processors of frozen vegetables "in any way." (J.S., 11-12, note 22). Liberal, not strained, construction is a matter of equity for "grandfather" statutes. Atomizing the articles encompassed requires reading the term "frozen vegetables" in Section 7 (a) of The Transportation Act of 1958 as "fresh frozen vegetables", ignoring the legislative purposes, and disregarding all practical consequences.

2. The District Court rejected the strained construction of the statute urged by Appellees because it regarded as necessary (J.S., 26-27) the harmonizing of Administrative Ruling No. 107 with the statutory languages. Such harmonizing was unnecessary, however, because (J.S., 13-15): (1) Administrative Ruling No. 107 had no standing before or apart from enactment of Section 7 of the 1958 Act; (2) the terms of Section 7 do not suggest or require such harmonizing, the second proviso of Section 7 (a) employing the term "frozen vegetables", not "fresh frozen vegetables" as Appellees and the District Court read it; and (3) the Commission's decision (J.S., 31-41) does not even mention Ruling 107 or suggest the need for harmonizing it with anything.

United States v. Carolina Freight Carriers Corp., 315 U.S. 475, at 488 (1942).

Appellees argue (G.M., 9-11; R.M., 4-10) that prior decisions, including a *per curiam* affirmance by this Court, require distinguishing the first and second provisos of Section 7(a) of the 1958 Act, according "grandfather" rights only respecting those covered by the second, not the first, proviso. The cases cited by Appellees did not involve articles falling within any of the commodity descriptions in the second proviso and were properly distinguished by the District Court (J.S., 24-25).

The District Court in its opinion and thereafter made it plain that it regarded the issues involved as novel and difficult.

3. Even if the District Court was correct in assuming that Ruling 107 and the statutory language require harmonizing, the question remains whether the enzyme inactivation test is appropriate. It can hardly be doubted that the Commission itself conceived of it in these proceedings as a means of distinguishing the particular

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At the oral argument held December 5, 1962, before the three-judge District Court on Appellee's motion for an injunction pending appeal (thereafter granted), Chief Judge John Biggs, Jr., of the Circuit Court of Appeals, Third Circuit, stated in connection with the opposing argument of Appellees (Transcript 27-28):

> "But getting precise and leave out that question, here is an original question which, frankly, I for one had a great deal of difficulty with. I think we decided the case correctly, but that is a mere thought.
>
> "You have a review before the highest tribunal, which I think unquestionably would have to dispose of it on argument, and I can't answer that, of course. That would seem to me to constitute somewhat of a special circumstance under the case in point.
>
> "Don't you consider that to be of somewhat an unusual situation?
>
> "Generally in these three-judge cases that involve the Interstate Commerce Commission, without a dissenting opinion, it is fairly clear. But in this case, though, you are perfectly positive on your side, and your side is perfectly positive we are correct. I personally feel some doubts on this subject."

frozen vegetables involved from those specifically held by courts to be unmanufactured agricultural commodities. Prior to reversal by judicial interpretation, the Commission considered *all* frozen vegetables to be manufactured products.[1] Following the *Home Transfer*[2] and *Frozen Food*[3] decisions, the Commission explicitly refused to find the exemption applicable to any but the specific vegetables involved in those cases.[4] Here the "*Status* case," J.S. 31-44[5], the enzyme inactivation test was adopted for the first time as a rationalization for limiting the scope.

[1] *Ex parte Determination of Exempted Commodities*, 52 M.C.C. 511, at 534 (1951).

[2] *Home Transfer & Storage Company v. United States et al.*, 141 F. Supp. 599 (W.D. Wash., 1956), aff'd *per curiam* 352 U.S. 884 (1956).

[3] *Frozen Food Express v. United States et al.*, 148 F. Supp. 396 (S.D. Tex., Houston Div'n, 1956), aff'd *per curiam* 355 U.S. 86 (1957).

[4] *Hughes Extension—Frozen Foods*, 71 M.C.C. 457 (1957); *Motor West Coast Transport, Inc., Extension—Montana*, 71 M.C.C. 1 (1957).

[5] "In this connection Commissioner Webb, in a concurring opinion issued last month, stated: *Refrigerated Food Express, Inc., Extension—Aroostook County, Maine*, No. MC-113843 (Sub No. 40) (not yet printed, mimeo pages 15, 16): 'Our predecessors, who granted the authority in question to applicant's predecessor, thought that frozen french fried potatoes were frozen vegetables. For many years our Bureau of Motor Carriers has informally advised carriers who hold authority to transport frozen vegetables that they lawfully may carry frozen potato items. Prior to the report in the *Status* case, decided September 28, 1959, the Commission had never drawn any distinction between vegetables based upon the extent of cooking prior to freezing. Even in the *Status* case, the frozen potato items which were held to be beyond the purview of Section 7 of the Transportation Act of 1958 were described, nevertheless, as "frozen vegetables." 81 M.C.C. at 656."

"It is unfair, in my opinion, to attribute to former Commissioners an error committed by the present Commission. Our predecessors believed that *all* frozen vegetables were non-exempt. They granted authority to transport 'frozen vegetables.' To avoid atomization of the grants, they generally refrained from limiting such

The Government's Motion argues (8-9) and the District Court agreed (J.S., 26-28) that the enzyme inactivation test is in accord with the *Home Transfer* decision. That decision concerned frozen vegetables described, in part, as heated (J.S., 26-27) "sufficiently to kill the enzymes . . . ." The decision neither held nor suggested that further heating would alter the status of a vegetable. Nevertheless, the Commission (J.S., 38-41), the District Court (J.S., 26-28) and Appellees have seized that point as a status determinant. Nothing magical occurs at the enzyme inactivation point; indeed, it is only through chemical analysis that the enzyme inactivation point may be determined. The assertion (J.S., 39) that cooking beyond the enzyme inactivation point causes a "change in texture as it comes from the field" is nothing more than adaptation of the "natural state theory" rejected by this Court. Thus, the enzyme inactivation test is neither the same as, nor a proper substitute for, the "continuing substantial identity" test enunciated by this Court in the *East Texas* case. It is simply an improper means for distinguishing frozen vegetables and restricting the scope of "grandfather" rights under the 1958 Act.

4. The Commission did not, as the Government's Motion suggests (6-8), properly apply the "continuing substantial identity" test. The technical evidence received did not, as argued, relate for the most part to french fried potatoes. The evidence concerned all forms of

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qualifying phrases as 'cooked,' 'uncooked,' 'partially cooked,' 'processed,' etc. In any event, they can hardly be blamed for failing to anticipate that the Supreme Court would hold certain frozen vegetables to be exempt from regulation, that the Congress would roll-back the judicially declared exemption, and that the Commission would then, for the first time, draw a distinction between frozen vegetables based upon the extent of cooking prior to freezing."

East Texas Motor Freight Lines, Inc. v. Frozen Food Express, 351 U.S. 49, at 52-54 (1956).

vegetables, showing that they are processed similar
often in the same facilities. Particularly involved w
the frozen forms in which potatoes, onions, and spi
are marketed and the batch-packed forms in which ot
types of frozen vegetables are marketed. The Commis
explicitly employed three criteria (J.S., 38-41), two
which the District Court opinion (J.S., 29-30) found
applicable. No witness, whether favoring or opposing
position here taken by Appellants, suggested that
frozen vegetables here involved were distinguishable
any material respect from those conceded to have b
exempt prior to the 1958 Act. Aside from the enz
inactivation test the District Court opinion gives no ev
ence to any other ground in the Commission's decision;
plenary consideration of the merits would disclose no

5. The Government's Motion first concedes (6, n
"grandfather" rights accrued if the involved frozen ve
tables were exempt prior to the 1958 Act; later
however, it argues that no "grandfather" rights accr
even if they had been exempt. Appellants respectfu
submit that under proper interpretation the involv
frozen vegetables were exempt prior to the 1958 Act
were within the "grandfather" rights created thereun
This Court has not previously disposed of the issues. T
case affords the Court an opportunity to determine
proper interpretation of Section 7 of the Transportat
Act of 1958, including the circumstances and standa
under which a determination is required of the p
status of articles affected thereby.

Section 7 of the Transportation Act of 1958 was
acted to provide certainty, not confusion, and to ha
additional items under regulations in a manner wh
would protect "grandfather" motors carriers of fro
vegetables and not hinder or hamper processors in
way. The granting of Appellees' Motions would p

[1] The citations offered in the Government's Motion do not
do not support the statement therein that no "grandfather" r

pefuate confusion, necessitating pre-1958 status determinations of additional frozen vegetables while seriously harming "grandfather" motor carriers and the processors they serve.

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were conferred because the involved frozen vegetables were not exempt prior to the 1958 Act. Indeed, witness after witness before the congressional committees (and committee members) expressed uncertainty as to the scope of the exemption. E.g., *Hearings on H.R. 5823 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 85th Cong., 2d Sess., pp. 159, 163, 340-41.

To suggest (G.M., 10-11) that Congress sought to limit the exemption is immaterial. Insofar as frozen vegetables are concerned Congress eliminated the exemption, protecting existing carriers and processors with "grandfather" rights for *all* frozen vegetables.

[11] The District Court (J.S., 29-30) limited its approval here to the specific frozen vegetables covered by the Commission's findings. Additional frozen vegetables were involved in *Ballentine Produce, Inc. v. United States*, 205 F. Supp. 679 (W.D. Ark. Ft. Smith Div'n. 1962), but the District Court there found the Commission's orders not reviewable. (J.S., 7-8, note 12). The Commission's decision in the *Hughes* case, *supra* (note 7) is not final even at this date, the proceeding having been reopened, consolidated with another and reheard. On September 20, 1960 the United States District Court for the Eastern District of Pennsylvania, in C.A. 28304, *Hughes v. United States et al.*, enjoined the Commission against enforcing its orders therein (covering, *inter alia*, the handling of frozen french fried potatoes and many other types of frozen vegetables) and stayed the court case pending final action in the proceedings before the Commission.

CONCLUSION

It is respectfully requested that Appellees' Motions to Affirm be denied and that plenary consideration of the issues be afforded.

Respectfully submitted,

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